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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

DELUXE ELECTRONIC PAYMENT SYSTEMS, INC.,
Petitioner,

v.

MELLON BANK N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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134 pp

QUESTIONS PRESENTED

1. Whether an appellee who failed to oppose a post-trial Rule 50(b)/59 motion on the ground that issues were waived by their absence in a pre-verdict Rule 50(a) motion, may nonetheless argue such waiver on appeal? The court below accepted appellee's contention of waiver, in conflict with decisions of the Second, Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits.

2. Whether Rule 50, Fed. R. Civ. P., imposes a strict or flexible standard for assessing the adequacy of a pre-verdict Rule 50(a) motion for entry of judgment as the prerequisite for a post-trial Rule 50(b) motion? The court below adhered to a strict standard that conflicts with decisions of the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.

3. Whether arguments in favor of a new trial are waived on appeal in the absence of a pre-verdict Rule 50(a) motion addressing the same issues, even though appellant's post-trial motion under Rules 50(b) and 59 raised all such issues? The court below held that petitioner waived its appellate challenge to the excessiveness and speculative nature of a $30 million verdict because its arguments were not made in a pre-verdict Rule 50(a) motion. That holding is in conflict with decisions of this Court and of the First and Fifth Circuits.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner Deluxe Electronic Payment Systems, Inc. (formerly named Deluxe Data Systems, Inc.) was a defendant in the district court and appellant/cross-appellee in the court of appeals. For consistency, this petition will refer to petitioner using the terminology employed in the lower courts, "Deluxe Data."

Respondent Mellon Bank N.A. was the plaintiff in the district court and appellee/cross-appellant in the court of appeals.

Deluxe Corporation was a defendant in the district court and prevailed on all claims against it. In the court of appeals, Deluxe Corporation was not an appellant; it was only a cross-appellee. Deluxe Corporation prevailed in the court of appeals and is not a petitioner in this Court.

RULE 29.6 STATEMENT

Petitioner states that all of its parent companies and subsidiaries (except wholly-owned subsidiaries) are as follows:

Petitioner Deluxe Electronic Payment Systems, Inc. (formerly named Deluxe Data Systems, Inc.) is a wholly-owned subsidiary of Deluxe Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

FEDERAL RULES INVOLVED 2

INTRODUCTION AND STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 13

I. IN EVERY OTHER CIRCUIT THAT HAS DECIDED THE ISSUE, RESPONDENT WOULD HAVE BEEN PRECLUDED FROM PRESENTING ITS WAIVER ARGUMENT 15

II. THE THIRD CIRCUIT'S INFLEXIBLY RESTRICTIVE VIEW OF RULE 50(b) CREATES ANOTHER CONFLICT 18

III. THE THIRD CIRCUIT'S FAILURE TO CONSIDER PETITIONER'S ARGUMENTS AS THE BASIS FOR A NEW TRIAL IS ALSO IN CONFLICT WITH DECISIONS OF OTHER COURTS 23

IV. IMPORTANT PRACTICAL AND POLICY REASONS STRONGLY SUPPORT THIS COURT'S REVIEW 24

CONCLUSION 27

INDEX TO APPENDICES

APPENDIX A A1
United States Court of Appeals for the Third Circuit Opinion

APPENDIX B A13
District Court's Order Partially Granting Deluxe Data's Motion for Summary Judgment

APPENDIX C A22
District Court's Order Denying Deluxe Data's Motion in Limine

APPENDIX D A23
District Court's Order Denying Deluxe Data's Rule 50(a) Motion at the Close of Plaintiff's Case

APPENDIX E A29
District Court's Order Denying Deluxe Data's Rule 50(a) Motion at Close of Evidence

APPENDIX F A30
District Court's Order Denying Deluxe Data's Rule 50(b)/59 Motion

APPENDIX G A31
United States Court of Appeals for the Third Circuit Judgment

APPENDIX H A33
United States Court of Appeals for the Third Circuit Denial of Deluxe Data's Petition for Rehearing

APPENDIX I A35
Federal Rules of Civil Procedure 50 and 59

APPENDIX J A38
Deluxe Data's Rule 50(a) Motion

APPENDIX K.....A46
Deluxe Data's Rule 50(b)/59 Motion

TABLE OF AUTHORITIES

Page(s)

Bachtel v. Mammoth Bulk Carriers, Ltd.,
605 F.2d 438 (9th Cir. 1979), *overruled on other grounds, Brown v. American Mail Line, Ltd.*, 625 F.2d 221 (9th Cir. 1980) 18

Beauford v. Sisters of Mercy-Province, Inc.,
816 F.2d 1104 (6th Cir.),
cert. denied, 484 U.S. 913 (1987) 17

Beaumont v. Morgan,
427 F.2d 667 (1st Cir.),
cert. denied, 400 U.S. 882 (1970) 19

Bohrer v. Hanes Corp.,
715 F.2d 213 (5th Cir. 1983),
cert. denied, 465 U.S. 1026 (1984) 18, 19

Bonner v. Coughlin,
657 F.2d 931 (7th Cir. 1981) 18

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.,
140 F.3d 494 (3d Cir. 1998) 25

Carden v. Westinghouse Electric Corp.,
850 F.2d 996 (3d Cir. 1988) 25

Collins v. Illinois,
830 F.2d 692 (7th Cir. 1987) 16

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 26

DeMarines v. KLM Royal Dutch Airlines,
580 F.2d 1193 (3d Cir. 1978) 18, 25

Federal Savings & Loan Insurance Corp. v. Reeves,
816 F.2d 130 (4th Cir. 1987) 19

Foman v. Davis,
371 U.S. 178 (1962) 3, 13, 24

Gibeau v. Nellis,
18 F.3d 107 (2d Cir. 1994) 16, 17

GE v. Joiner,
522 U.S. 136 (1997) 26

Greenleaf v. Garlock, Inc.,
Nos. 97-1820 & 1821, 1999 U.S. App.
LEXIS 7927 (3d Cir. Apr. 26, 1999) 25

Halsell v. Kimberly-Clark Corp.,
683 F.2d 285 (8th Cir. 1982),
cert denied, 459 U.S. 1205 (1983) 16, 17, 18

Horsey v. Mack Trucks, Inc.,
882 F.2d 844 (3d Cir. 1989) 25

Jack Cole Co. v. Hudson,
409 F.2d 188 (5th Cir. 1969) 19

Kirk v. Raymark Industries, Inc.,
61 F.3d 147 (3d Cir. 1995) 25

Kumho Tire Co. v. Carmichael,
119 S. Ct. 1167 (1999) 26

Lightning Lube, Inc. v. Witco Corp.,
4 F.3d 1153 (3d Cir. 1993) 25

Miller v. Premier Corp.,
608 F.2d 973 (4th Cir. 1979) 18

Montgomery Ward & Co. v. Duncan,
311 U.S. 243 (1940) 4

Myers v. Norfolk Livestock Market, Inc.,
696 F.2d 555 (8th Cir. 1982) 18

Neely v. Martin K. Eby Construction Co.,
386 U.S. 317 (1967) 4, 23

Quinn v. Southwest Wood Products, Inc.,
597 F.2d 1018 (5th Cir. 1979) 18

Rankin v. Evans,
133 F.3d 1425 (11th Cir.), *cert. denied*,
119 S. Ct. 67 (1998) 19, 20

Schiavone v. Fortune,
477 U.S. 21 (1986) 13

Singer v. Dungan,
45 F.3d 823 (4th Cir. 1995) 19

Thompson & Wallace, Inc. v. Falconwood Corp.,
100 F.3d 429 (5th Cir. 1996) 15

Trujillo v. Goodman,
825 F.2d 1453 (10th Cir. 1987) 19

Urti v. Transport Commercial Corp.,
479 F.2d 766 (5th Cir. 1973) 23

Velazquez v. Figueroa-Gomez,
996 F.2d 425 (1st Cir.),
cert. denied, 510 U.S. 993 (1993) 23

Whelan v. Abell,
48 F.3d 1247 (D.C. Cir. 1995) 15

Williams v. Runyon,
130 F.3d 568 (3d Cir. 1997) 25

Yohannon v. Keene Corp.,
924 F.2d 1255 (3d Cir. 1991) 25

STATUTES, REGULATIONS AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 12

28 U.S.C. § 1332 6

31 C.F.R. § 202.2 (1998) 5

Fed. R. Civ. P 1 14

Fed. R. Civ. P. 50 ..... *passim*

Fed. R. Civ. P. 59 ..... *passim*

OTHER AUTHORITIES

William Glaberson, "Caseload Forcing Two-Level System For U.S. Appeals/ More One-Word Rulings/ Tens of Thousands of Cases Get Limited Review, According to Judges and Scholars," *New York Times*, Mar. 4, 1999, at 1 26

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MELLON BANK N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Deluxe Electronic Payment Systems, Inc., ("Deluxe Data") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* A1-A12) is not reported. The orders of the district court on motions for summary judgment (App., *infra,* A13-A21); on petitioner's motion *in limine* to exclude respondent's expert's damages study (App., *infra,* A22); on petitioner's motion for judgment as a matter of law at the close of respondent's case (App., *infra,* A23-A28); on petitioner's motion for judgment as a matter of law at the close of all the evidence (App., *infra,* A29); and on petitioner's post-trial motion for judgment as a

matter of law and for a new trial (App., *infra*, A30) are not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, A33-A34) was entered on January 12, 1999 and amended on May 13, 1999. A timely petition for rehearing was denied on February 18, 1999 (App., *infra*, A31-A32). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

The pertinent portions of Rules 50(a), 50(b), and 59, Fed. R. Civ. P., are set out at App., *infra*, A35-A37.

INTRODUCTION AND STATEMENT OF THE CASE

This case presents an ideal opportunity for the Court to address frequently recurring, intensely practical questions that affect the administration of justice in the federal courts, *viz.*, the procedural hoops through which a party must jump in order to preserve issues for appellate review. Notwithstanding motions for summary judgment, *in limine* evidentiary submissions, proposed jury instructions (and objections to the actual charge), motions under Rule 50(a) at the close of the plaintiff's case and at the close of the evidence, and a comprehensive post-trial motion for judgment as a matter of law or for a new trial under Rules 50(b) and 59, the Third Circuit held that petitioner had waived virtually all issues for appellate review. That holding is incorrect and in direct conflict with decisions of this Court and other federal courts of appeals. Indeed, six courts of appeals have expressly held that appellees like Mellon – which failed to oppose a post-trial Rule 50(b)/59 motion on

grounds of waiver – cannot urge "waiver" as a basis for shielding the merits from scrutiny on appeal.

Under the decision below, parties and counsel may traverse the rocky terrain of trial proceedings only to find that the road to appeal is blocked by previously unknown, invisible land-mines. It should be sufficient to warrant review that the Third Circuit's decision in this case erects roadblocks to appellate review that do not exist in other courts of appeals. Indeed, eight circuit courts have rejected the Third Circuit's restrictive approach in favor of a reading consistent with the purpose of the Federal Rules. The need for review is all the more acute because the decision below erects an impossible standard: the Third Circuit held that petitioner waived arguments challenging the excessive and conjectural nature of a $30 million verdict because arguments were not made in a Rule 50(a) motion *before* the jury deliberated. On that basis, the Third Circuit did not even consider petitioner's arguments as grounds for a new trial, in direct conflict with other courts of appeals and with the express language of Rule 59, which lacks any such requirement.

The decision below promotes two impulses that are calamitous to the fair and correct administration of justice: it rewards gamesmanship at the expense of substance, and it permits important issues to pass through the federal courts without ever receiving proper judicial scrutiny on the merits. In short, the Third Circuit's view flatly contradicts this Court's admonition that decisions on the merits are not to be avoided on the basis of "mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). The record in this case illustrates and starkly exposes the perils of litigating under the standards imposed by the court of appeals. The Third Circuit's waiver analysis makes a hyper-technical pre-verdict Rule 50(a) motion the linchpin in obtaining appellate review

on the merits. That emphasis was especially misplaced in this case where the petitioner's written motion under Rule 50(a) at the close of the evidence was denied by the district court ***before the motion was even filed***. App., *infra*, A29. Yet the Third Circuit transformed that motion into the vehicle for finding waiver, thus precluding appellate scrutiny of an extraordinarily excessive and speculative verdict, even though all of the issues raised on appeal were set forth in Deluxe Data's Rule 50(b) motion and Mellon did not argue that they caused any surprise or prejudice or would have changed in any way Mellon's presentation of evidence at trial.

The decision below also disrupts a carefully crafted symmetry inherent in the Federal Rules of Civil Procedure. On the one hand, the decision below subjects appellants to draconian, unpredictable standards for "waiver" unless an issue was presented to the trial court in a very particularized way and at a single specific time. On the other hand, and in conflict with six other circuits, the decision below relieves appellees of any commensurate requirement to present their "waiver" contention to the district court in response to a post-trial motion under Rules 50 and 59. For these intensely practical reasons, as well as to resolve the existing conflict among the circuits with respect to Rules 50 and 59, this Court's review is plainly warranted, just as it was in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 247 (1940) (footnote omitted): "[t]he importance of a decision by this Court, respecting the proper practice under Rule 50(b), and a conflict of decisions, moved us to grant certiorari." *See Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 320-21 (1967) (granting certiorari on construction of Rule 50 and directing parties' attention to additional issue under Rule 50).

1. This case stems from unsuccessful negotiations by two sophisticated commercial entities to submit a bid for the

first step in a series of potential government contracts. For several months in 1995, Deluxe Data and Mellon discussed the possibility of working together to submit a response to a U.S. Treasury Invitation for Expression of Interest ("IEI") regarding electronic benefits transfers ("EBT") services[1] to members of a coalition of Southern states (the "SAS"). *See* App., *infra*, A3. At all times the parties contemplated that any agreement between them would be reduced to a finalized written contract. After eight months of discussions and negotiations, no such contract was ever finalized or signed. *Id.* at A4; CA App. A1852, A2220, A2279, A3912-13, A4073-74, A4821.[2]

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[1] EBT is the process by which federal or state governments electronically transmit payments of government benefits (*e.g.*, Social Security) to individuals who do not have their own bank accounts. App., *infra*, A3 n.1. The individual recipient accesses these benefits with a magnetized card similar to an ATM card. CA App. 1795, 2003 2917. EBT does ***not*** include electronic transfer of funds by "direct deposit" into a pre-existing account at a bank of the recipient's choice. *Id.* at 2559, 2915, 2917, 3701.

The Treasury bidding process required that the prime contractor be a financial institution. 31 C.F.R. § 202.2 (1998). Thus, Deluxe Data, which had extensive experience in providing EBT services, was precluded from submitting a bid in its own behalf as a prime contractor. Mellon, which had no EBT experience whatsoever, sought out Deluxe Data as a potential subcontractor. CA App. 7551, 2068, 1896-97, 1991, 2398-99, 2969, 1919-22, 2060-61, 2102-04, 2925, 2969.

[2] *See* App., *infra*, A3; CA App. 4419. During the course of their discussions, the only document signed by both parties was a Confidentiality Agreement, stating that it was entirely conditional "unless and until a definitive agreement" was "executed and delivered." CA App. 4450. Even the last draft document exchanged by the parties before their discussions ended – a

Lacking a final arrangement with Mellon after many months – and with the deadline for bids looming – Deluxe Data notified Mellon on July 11, 1995, that it would no longer pursue their negotiations toward a possible teaming effort. App., *infra*, A4; CA App. 4900. Following up on discussions begun in June, Deluxe Data later joined as a subcontractor in a bid submitted by Citibank. App., *infra*, A4; CA App. A2969, 2976, 4930-46.[3] Citibank was awarded the federal contract and the right to negotiate individually with each SAS state on prospective contracts. CA App. 844. Mellon never submitted a bid. App., *infra*, A4.

2. On October 11, 1995, Mellon filed suit in the Court of Common Pleas Allegheny County, Pennsylvania, alleging a breach only of the confidentiality agreement. CA App. 66. Mellon did not allege that any contract existed for the parties to "team" together on a bid for the SAS Project, much less that Deluxe Data had breached any such agreement. On October 31, 1995, the case was removed to the United States District Court for the Western District of Pennsylvania, where jurisdiction rested on 28 U.S.C. § 1332.

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document neither party signed – stated that no agreement had been reached on such essential terms as the price that Mellon (the prime contractor) would pay Deluxe Data (a subcontractor), the scope of duties Deluxe Data would perform, and important indemnification issues. CA App. 4833-34. In the absence of such further agreements – which did not occur – the unsigned draft expressly stated it "shall terminate and . . . be of no further force or effect." *Id.* at 4833.

[3] Unlike Mellon, Citibank had substantial experience and the capability to perform EBT services itself. Accordingly, Deluxe Data's role on the Citibank bid was far smaller than its prospective role as the sole provider of all EBT services in a potential Mellon bid. CA App. A1812; 2062; 2064; 4930-46.

CA App. 39. On January 17, 1996, Mellon amended its complaint to allege, for the first time, that Deluxe Data had breached an agreement to work together to prepare a bid. CA App. 89.[4]

The district court denied Deluxe Data's motion to dismiss the amended complaint for failure to state a claim. CA App. 355-56. At the close of discovery, Deluxe Data successfully moved for summary judgment dismissing some claims. App., *infra*, A13-A21. The parties went to trial on the remaining claims, largely predicated on Mellon's assertion that – contrary to its expressly conditional language – a preliminary, three-sentence letter nonetheless constituted a binding agreement to work together to prepare a bid.[5]

3. Prior to trial, Deluxe Data filed an *in limine* motion to exclude Mellon's expert damages study. CA App.

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[4] The amended complaint also asserted claims against Deluxe Data's parent, Deluxe Corporation. Deluxe Corporation prevailed on all claims against it (some on summary judgment, the remainder at trial). App., *infra*, A4 n.2; CA App. 1199; 1202-05; 4306. The claims against Deluxe Corporation are not raised in this petition.

[5] The entire text of the letter stated (C.A. App. 4419; *see* App., *infra* A3):

> As we discussed last week, Deluxe agrees to team exclusively with Mellon for the Southern Alliance of States EBT IEI response subject to finalizing a Teaming Agreement.
>
> Throughout the process of mutual education that Mellon and Deluxe have followed to date on this project, we have been very impressed with the quality of knowledge and expertise exhibited. I look forward to finalizing a Teaming Agreement and putting together a full team for the effort.

1261-64. Although Mellon did not allege the existence of an agreement to *perform* any EBT services, it offered a damage model seeking to recover lost future profits on an extended series of contracts in the SAS Project for which it never even submitted a bid. Among its many highly conjectural aspects, Mellon's damage theory assumed that every benefits recipient in every SAS state would choose to receive payments by EBT (rather than by direct deposit into their personal accounts which, as the IEI recognized, most recipients prefer).[6] Based on these assumptions, Mellon sought future lost profits of $72.5 million – an amount that exceeded by tenfold the profits Citibank projected it would obtain from doing more work and having a larger role than Mellon ever contemplated or could perform. In response to Deluxe Data's motion *in limine*, the district court ruled that the expert's written report was inadmissible but that the witness could testify to the substance of his damages model. CA App. 1656.[7]

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6 Mellon's lost profits damage theory also made the following conjectural assumptions: that the parties actually entered into a teaming agreement to submit a bid, that they further agreed to terms by which Deluxe Data would perform EBT services, that they actually submitted a bid to the federal government, that they prevailed in the bid competition, that they persuaded every state in the SAS to commit to the full range of services for the full contract period (including all discretionary renewal periods), and that they agreed to split profits equally (contrary to all drafts exchanged, each of which specified that Deluxe Data would receive the larger share because it was performing all the EBT work).

7 During trial, Deluxe Data's cross-examination of Mellon's damages expert was sharply curtailed as the district court precluded inquiry into key assumptions underlying his calculations, in particular his assumption that a hypothetical bid by Mellon would have prevailed and would have resulted in federal

and state contracts with all SAS states, including all optional renewal periods. CA App. A2925-26; 3927-32; 3934; 3935. The court specifically barred Deluxe Data from cross-examining the expert witness on his failure to consider Mellon's lack of any experience in EBT processing (CA App. A2925-26):

> Q [by Ms. Hewitt, counsel for Deluxe Data]: And at the time Mellon Bank started to talk with Deluxe Data, you are aware, are you not, that Mellon Bank had never run an EBT project?
> MR. MCGOUGH [counsel for Mellon]: Your Honor, can I object --
> THE COURT: Sustained.
> MR. MCGOUGH: -- I think this is going far afield.
> THE COURT: Sustained. It's irrelevant. This is a damage witness.
> MS. HEWITT: Your Honor --
> THE COURT: He is assuming that they got the contract. His damage estimates are based upon that.
> By Ms. Hewitt: * * *
> Q: In reaching your assumption that Mellon and Deluxe Data would have won, did you engage in any analysis as to Mellon's EBT experience?
> MR. MCGOUGH: Your Honor, I object.
> THE COURT: Sustained.

During Deluxe Data's direct examination of its own damages expert, the court – over objection, and in the presence of the jury – instructed the witness also to assume that Mellon would have won the government contracts (*see* CA App. A3930, 3934):

> THE COURT [at sidebar conference]: . . . He will have to assume that they get the bid and then analyze the financial aspects on that basis.
>
> * * *
>
> Q [by Ms. Hewitt] [in open court]: Okay. Now, the Court has instructed me that you are to assume that Mellon and Deluxe Data would have won this bid, because that is what [Mellon's expert] assumed; and in order to critique their opinion, we're

4. At the close of Mellon's case, Deluxe Data moved under Rule 50(a) for entry of judgment on all remaining claims. The district court denied the motion, with the exception that it dismissed Mellon's claims for punitive damages. App., *infra*, A23-A28. At the close of all the evidence, Deluxe Data moved again for entry of judgment as a matter of law. That motion, which was pivotal in the Third Circuit's finding of waiver, was precipitously denied by the district court before the papers were even filed (*id.* at A29):

> MS. HEWITT [counsel for Deluxe Data]: Your Honor, I didn't want to do this in the presence of the jury, but prior to actually resting, we have a motion and brief in support thereof renewing our motion for judgment as a matter of law, and I simply wanted to get that on the record prior to resting.
>
> THE COURT: Sure; they're denied.

5. The jury found Deluxe Data liable on two breach of contract claims (breach of an agreement to submit a bid and "if successful, to implement" and breach of a confidentiality agreement) and on five tort claims.[8] CA App.

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going to ask you at, the Court's instruction, to assume that same assumption.

[8] Mellon's breach of contract claim alleged only a limited agreement to work together to prepare a bid for the Treasury Department. *See* CA App. 899 (Mellon's Proposed Jury Instructions). Mellon never claimed or submitted evidence of any agreement for the actual provision of EBT services to the federal government or the states; in short, there was no claim of an agreement "to implement" any services whatsoever.

4304-06. With respects to damages, the jury awarded $30 million for an amalgam of claims all stemming from breach of an agreement to submit a bid and, if successful to implement; the jury awarded zero damages for all claims related to breach of a confidentiality agreement. CA App. 1540-41.

On Friday afternoon, November 14, 1997, Deluxe Data timely filed an extensive post-trial motion, pursuant to Rules 50 and 59, Fed. R. Civ. P., for judgment as a matter of law, a new trial, and remittitur. (App., *infra*, A46-A96.) On Monday morning, November 17, 1997, without receiving a written response from Mellon, the district court issued a one-sentence order denying the motion. App., *infra*, A30. During proceedings in the district court, neither Mellon nor the trial

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In crafting jury instructions during the final stages of trial, the district court requested Mellon to explain its breach of contract claim (CA App. A3569):

> THE COURT: I'm not sure exactly what that's based on, and maybe you can tell me that.
> MR. MCGOUGH [counsel for Mellon]: It's based on breach of the agreement to work with Mellon exclusively.
> THE COURT: Okay.
> MR. MCGOUGH: Toward submission of a bid.

But, the district court's jury instructions *sua sponte* (and over objections) misstated the claim as an alleged breach of an agreement "to team exclusively to submit a bid for the Southern Alliance of States project ***and, if successful, to implement the project***." CA App. A4162 (emphasis added). The court recited this incorrect formulation twelve times in the jury instructions and verdict forms. *Id.* at A4162-63, 4165-66, 4170-72, 4181, 1534-35. *See id.* at A4131-32, 4203, 4207 (objections). Not once did the instructions correctly recite the alleged contract.

judge ever suggested that arguments in Deluxe Data's motion had been waived. *See* CA App. 1592.

6. On appeal to the Third Circuit,[9] Deluxe Data reiterated arguments made in its post-trial Rule 50(b)/59 motion in the district court. Both its opening and reply briefs requested that "the judgment be reversed and the case dismissed" or, alternatively, that "the judgment should be set aside and a new trial or remittitur ordered." In response, Mellon sought to avoid review on the merits by throwing a smokescreen of "waiver" over the entire proceeding.[10]

In an unpublished opinion, the Third Circuit panel affirmed. The court largely agreed with Mellon's "waiver" contention, holding that Deluxe Data "waived most of its arguments presented on appeal due to its failure to include these arguments in the appropriate Rule 50 motion, propose jury instructions on certain issues, or object to jury instructions actually given." App., *infra*, A7-A8. The court specifically held that "[a]s to the arguments regarding the excessive and conjectural nature of the award, although Deluxe Data appropriately argued that the jury award was excessive and conjectural in its post-trial Rule 50 motion, it still failed to preserve any of the eight reasons for its excessiveness since these arguments could have been, but were not, made in its first Rule 50 motion." *Id.* at A8.

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[9] Appellate jurisdiction rested on 28 U.S.C. § 1291.

[10] Deluxe Data's opening brief stated three questions presented. Mellon's brief fragmented the questions into 22 issues; Mellon later filed an improper "surreply" brief (which the court ordered stricken) seeking to expand this number to some 39 issues. Mellon argued that unless each such microscopic sub-issue could be found *in haec verba* in Deluxe Data's pre-verdict Rule 50(a) motions, then it was "waived" for purposes of appeal.

Accordingly, the court of appeals did not review Deluxe Data's arguments challenging the excessive damages on either a *de novo* or abuse of discretion standard; all such issues were examined only for plain error. *Id.* at A9.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with prior decisions of this Court and other courts of appeals on issues that have enormous practical consequences for litigation in the federal courts. If, as the court of appeals held, appellants must navigate through a labyrinth of hidden, unknown traps lest they forfeit the right to substantive appellate review, then the statutory entitlement to appeal from a final judgment has been transformed into an essentially discretionary function of the federal circuit courts. The decision below starkly contrasts with this Court's repeated admonition that "the spirit and inclination of the [Federal Rules of Civil Procedure] favored decisions on the merits, and rejected an approach that pleading is a game of skill in which one misstep may be decisive" and that "decisions on the merits are not to be avoided on the basis of 'mere technicalities.'" *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986), citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957), and quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962).

In finding waiver, the decision below conflicts with prior decisions in three distinct, yet related, respects. First, six other circuits have expressly held that unless an appellee asserted waiver in opposing a post-trial Rule 50(b) motion in the district court, then the appellee cannot argue waiver in the court of appeals, and the substantive issues must be reviewed on the merits. Second, even when an appellee's "waiver" argument is entertained, eight circuits have expressly held that a liberal standard applies to the determination whether an argument raised in a post-trial Rule 50(b) motion was

presaged in a Rule 50(a) motion. Third, since a Rule 59 motion for a new trial does not require ***any*** predecessor motion under Rule 50, even the complete absence of a Rule 50(a) motion cannot waive the right to substantive appellate review of issues supporting a new trial.

In contrast to these principles, which are designed to promote the just determination of every case (Rule 1, Fed. R. Civ. P.), the decision below creates a set of procedural defaults that operate with random caprice. In every other circuit that has addressed these procedural issues, this case would have received proper appellate review on the merits and would have been reversed. That is the essence of a conflict among the circuits, and this Court's review is plainly warranted.

Certiorari is all the more appropriate because of the frequency with which these important questions recur. The situation that exists in this case has arisen in a majority of circuits. Moreover, sixteen years ago the Fifth Circuit perceived that the Third Circuit's severe view of Rule 50 conflicts with the more flexible interpretation of other courts of appeals. *See* page 18 *infra*. That split has existed far too long and should be remedied. If, as in this case, waiver can be found on issues that petitioner presented to the district court before, during and after trial, then there is a pressing need for clear guidance on the steps necessary to preserve issues for appeal. That sorely-needed guidance can come only from this Court. This case presents a perfect opportunity to do so.

I. IN EVERY OTHER CIRCUIT THAT HAS DECIDED THE ISSUE, RESPONDENT WOULD HAVE BEEN PRECLUDED FROM PRESENTING ITS "WAIVER" ARGUMENT.

The Second, Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits have all held that unless an appellee argued waiver in opposing a Rule 50(b) motion in the district court, then the appellee has itself waived that argument on appeal. The opinions in those cases illuminate their stark conflict with the decision below.

The appellant in *Thompson & Wallace, Inc. v. Falconwood Corp.*, 100 F.3d 429, 435 (5th Cir. 1996), raised an issue that it "did not make . . . part of its pre-verdict rule 50(a) motion for judgment as a matter of law but did make . . . part of its post-verdict rule 50(b) motion for judgment as a matter of law." The Fifth Circuit endorsed the "wise rule" adopted by other courts of appeals: where a party "fails to raise the waiver argument in opposing the rule 50(b) motion" that party "cannot raise the waiver on appeal." *Id.* at 435. As the court explained, this rule promotes judicial efficiency and "allows the district court to hear the waiver allegation and report whether the party that failed to make the motion had a legitimate excuse (where, for example, the court instructed the litigant not to make the rule 50(a) motion.)." *Id.*

The same rule was applied in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995). Although appellants' post-trial motion presented an issue that they "failed to raise . . . in their pre-verdict motion," the appellee "failed to assert the violation of Rule 50(b), and thus he, in turn, waived that objection." *Id.* at 1251. The court therefore addressed the merits of the appeal.

In *Collins v. Illinois*, 830 F.2d 692, 698 (7th Cir. 1987), the appellant did not even move for a directed verdict during trial. The Seventh Circuit explained that:

> Normally, that failure to so move would prevent [appellant] from later moving for a judgment notwithstanding the jury's verdict. But in this case [appellees] did not challenge in the district court, at the time [appellant] moved for judgment notwithstanding the verdict, [appellant's] failure to move for a directed verdict. [Appellees] raise on appeal for the first time their claim that [appellant] did not properly comply with the procedural prerequisites to challenging the jury's verdict. It is well settled that issues not raised in the district court are waived on appeal. [citations omitted]. Consequently we will review [appellant's] arguments on the propriety of the judgment notwithstanding the verdict . . . .

The Seventh Circuit correctly perceived the need for symmetry in holding both parties to the same requirement of permitting the district court to pass first on issues and arguments presented on appeal. That court considered the merits of an issue even in the absence of any Rule 50(a) motion during trial. Thus, even if Deluxe Data had not filed any Rule 50(a) motion during trial – and in fact it made two such motions – the decision below would still be irreconcilable with the decision of the Seventh Circuit in *Collins.*

The same point is made even more starkly when the decision below is compared to the Second Circuit's decision in *Gibeau v. Nellis,* 18 F.3d 107, 108-09 (2d Cir. 1994). In that case the appellant "did not move for a directed verdict at

the close of evidence at trial." *Id.* at 109. But, the appellees failed to raise the procedural defense of waiver in response to a post-trial motion for judgment notwithstanding the verdict. Because of that failure, appellees "are the ones who have waived the issue." *Id.* Moreover, "[a]ppellees have not demonstrated that any interest of justice would be served by considering the waiver argument on appeal, and we therefore deem it waived." *Id.* (citing *Collins v. Illinois*). The Second Circuit, therefore, reviewed the merits of appellant's judgment n.o.v. motion and, in part, reversed.

The Sixth and Eighth Circuits have applied the same rule in cases affirming orders that *granted* judgment n.o.v. In *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 293-95 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983), the Eighth Circuit specifically, and on multiple grounds, rejected the contention that the failure to move for a directed verdict at the close of all the evidence necessarily waived the right to file a post-trial Rule 50(b) motion. Of particular pertinence here is the court's observation that this objection was not made in the district court in opposition to the judgment n.o.v. motion "at the time of its making." 683 F.2d at 294. In those circumstances, the court was "unwilling to allow [plaintiff's] belated objection to overcome [defendant's] substantial compliance with Fed. R. Civ. P. 50(b). Consequently, we believe the district court properly entertained [defendant's] motion for judgment n.o.v." *Id.* at 294-95. The same result obtained in *Beauford v. Sisters of Mercy-Province, Inc.*, 816 F.2d 1104, 1108 n.3 (6th Cir.) (affirming judgment n.o.v. and holding that "plaintiff's objection in this respect [to defendant's failure to renew directed verdict motion at the close of the evidence] was waived in light of the proceedings in the court below"), *cert. denied*, 484 U.S. 913 (1987).

These cases pose several strong reasons for granting certiorari. First, they plainly conflict with the decision

below. Second, they reflect the frequency with which this issue has arisen nationwide. Third, they illustrate the absence of any doctrinal justification for the decision below. Mellon did not argue, and the Third Circuit did not find, that any of the issues raised on appeal (all of which were in Deluxe Data's Rule 50(b) motion) caused any surprise or prejudice or would have changed in any way Mellon's presentation of evidence at trial.

II. THE THIRD CIRCUIT'S INFLEXIBLY RESTRICTIVE VIEW OF RULE 50(b) CREATES ANOTHER CONFLICT.

Even if there were no conflict on the question whether Mellon's "waiver" argument should have been entertained at all, the decision below would still be in conflict with decisions of other courts of appeals. The Third Circuit's extraordinarily restrictive reading of Rule 50(b) is out of step with opinions of eight other circuits that have rejected such hyper-technical roadblocks to appellate review on the merits.

Indeed, in *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216-17 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984), the Fifth Circuit expressly noted the variance between the Third Circuit and decisions of the First, Fourth, Seventh, Eighth and Ninth Circuits, all of which "have adopted a more flexible approach."[11] In affirming an order granting

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[11] *See* 715 F.2d at 216-17, citing *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), in contrast to *Myers v. Norfolk Livestock Market, Inc.*, 696 F.2d 555 (8th Cir. 1982); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Bonner v. Coughlin*, 657 F.2d 931 (7th Cir. 1981); *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1979); *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979), *overruled on other grounds, Brown v. American Mail Line, Ltd.*, 625 F.2d 221, 223 (9th Cir. 1980); *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018 (5th Cir. 1979);

judgment n.o.v. where the defendant made ***no*** motion for directed verdict at the close of the evidence, the court explained why the Third Circuit's hyper-technical approach is inconsistent with and contrary to "the liberal spirit imbuing the Federal Rules of Civil Procedure." *Id.* at 217. The court held, in harmony with most courts of appeals, that "[t]o demand a slavish adherence to the procedural sequence . . . would be 'to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.'" *Id.* (quoting *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979)).

More recently, in a case where the defendant failed to make a Rule 50(a) motion at the close of all the evidence, the Fourth Circuit also commented on the fact that "various courts have taken an indulgent view as to what constitutes a sufficient predicate for a Rule 50(b) motion." *Singer v. Dungan*, 45 F.3d 823, 828 (4th Cir. 1995). *See Federal Savings & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 137-38 (4th Cir. 1987) (reviewing on the merits an issue the party failed to raise in its Rule 50(a) motion but did include in a Rule 50(b) motion); *Trujillo v. Goodman*, 825 F.2d 1453, 1456 (10th Cir. 1987) (considering merits of issue even though no Rule 50(a) motion was made at the close of the evidence).

In contrast to Deluxe Data's extensive filings on, among other issues, the wildly conjectural nature of Mellon's claim for lost future profits, in *Rankin v. Evans*, 133 F.3d 1425, 1430-31 (11th Cir.), *cert. denied*, 119 S. Ct. 67 (1998),

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Beaumont v. Morgan, 427 F.2d 667 (1st Cir.), *cert. denied*, 400 U.S. 882 (1970); *Jack Cole Co. v. Hudson*, 409 F.2d 188 (5th Cir. 1969); 5A J. Moore & J. Lucas, *Moore's Federal Practice* at ¶ 50.08; 9 C. Wright & J. Miller, *Federal Practice and Procedure*: Civil § 2537 (1971 & 1982 Supp.).

neither of defendants' motions "specifically state[d] their grounds for the motion for a directed verdict." After a verdict in favor of plaintiffs, the district court granted judgment n.o.v. and, on appeal, the plaintiffs argued as appellants that Rule 50 posed an insurmountable procedural bar to judgment n.o.v. In a thorough analysis, the Eleventh Circuit observed that the rule is designed to ensure that the district court and the opposing party had notice of any deficiencies in the case prior to the jury's deliberations. Accordingly, the court examined the record and determined that, notwithstanding the total absence of ***any*** stated grounds in the pre-verdict Rule 50(a) motions, the district court and opposing counsel were aware of the issue raised in the post-verdict Rule 50(b) motion based on other events at trial, including defendant's submission of a trial memorandum on that issue. 133 F.3d at 1432-33.[12]

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[12] Numerous dispositive parallels to *Rankin* exist in this case. For example, one issue that arose during trial with respect to Mellon's damages was the question whether claims for lost future profits could be discounted to net present value. Prior to trial Mellon's expert calculated lost profits on both a discounted and undiscounted basis. CA App. 405. Consistent with that approach, Mellon proposed a jury instruction that did not prohibit such discounting but merely advised the jury that it "need not" discount to present value. CA App. 898. At trial, on the very morning that its damages expert was called to testify (as its final witness), Mellon argued – for the first time – that Pennsylvania law forbids discounting of lost profits. Deluxe Data asked for and received permission to address this newly-sprung issue in a written submission. CA App. 2783. That same day Mellon rested and the trial recessed for two weeks. When proceedings reconvened, Deluxe Data filed a trial memorandum on the subject. CA Supp. App. B21. The district court then ruled on the merits in Mellon's favor and precluded any presentation of discounted figures to the jury. CA App. 3948-50.

The time has surely come to resolve the conflict between the Third Circuit and the other courts of appeals that the Fifth Circuit noted sixteen years ago in *Bohrer*. This case is an ideal example because it epitomizes the abject sterility inherent in "slavish adherence" to technicalities. 715 F.2d at 217. Under the decision below, the denial of substantive review of issues plainly presented on appeal and in the Rule 50(b)/59 motion turns entirely on the contents of petitioner's pre-verdict Rule 50(a) motion – a motion the district court denied even before it was filed. The elevation of form over substance is all the more pronounced in this case because: (1) the district court expressly stated that Deluxe Data would "have an opportunity after the case to put your position on the record" (CA App. A3952); (2) there has never been any claim by Mellon, or finding by any court, that the issues in the Rule 50(b)/59 motion and on appeal were surprising or prejudicial to Mellon; and (3) relevant issues were in fact included in the Rule 50(a) motion and its accompanying brief, as well as other submissions prior to and during trial.[13]

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13 *See, e.g.*, CA App. A1261-64 (Motion *in Limine*) (detailing numerous speculative assumptions underlying Mellon's damages study); CA Supp. App. B194-96 (Summary Judgment Motion) (including a section arguing that Mellon's damages for the allegedly breached contracts were too speculative to present to a jury); 39 (Rule 50(a) Br.) ("[I]f the fact finder determines that Deluxe Data's conduct breached an agreement to negotiate exclusively with Mellon, Plaintiff can only be awarded the alleged damage it suffered as a result of the failure to negotiate, but not for the actual contract which might have been awarded had the parties agreed to bid together."); 40 (Rule 50(a) Br.) (noting that Mellon's lost profits claim must be limited because the evidence showed that "there was no agreement between the parties regarding ... the division of bid responsibilities between Mellon and Deluxe Data, the tasks that each would perform if awarded the contract ...."); 9 (*In Limine* Br.) (noting that the "disagreement over each party's scope of responsibility" rendered [Mellon's damages expert's]

In other courts of appeals, petitioner would have received full review of its contentions on the merits and under the correct standards of review. That is the defining essence of a conflict warranting certiorari.

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report inadmissible). Deluxe Data also proposed jury instructions targeting assumptions underlying Mellon's claim for lost profits and requesting that the court apply Pennsylvania's higher burden on lost profits claims in the context of a new, untried line of business. Deluxe Data's written requests included (CA App. 1451, 1458, 4120):

> When a party seeking to recover lost profits does not have an established history in that particular business, proving anticipated lost profits is very difficult. The party has the burden of proving that, despite no track record of its own, the amount of profits it would have made can be estimated with reasonable certainty. Accordingly, in order to prove lost profits in the context of an untried business, you must carefully consider the integrity of the evidence presented to create that degree of belief – reasonable certainty.
>
> Though damages for alleged lost profits can be given, they cannot be awarded where they are merely speculative. This is particularly true where a business is new and untried. You have heard testimony that Mellon Bank never engaged in the EBT processing business prior to the SAS Project. Therefore, unless you find sufficient basis for estimating lost profits to a reasonable degree of certainty, you cannot award Mellon Bank lost profits associated with the SAS Project.

The district court's response to all objections was: "I don't intend to charge the jury any differently than I already have." CA App. 4207.

III. THE THIRD CIRCUIT'S FAILURE TO CONSIDER PETITIONER'S ARGUMENTS AS THE BASIS FOR A NEW TRIAL IS ALSO IN CONFLICT WITH DECISIONS OF OTHER COURTS.

Petitioner's post-trial motion sought judgment as a matter of law or, alternatively, a new trial. Many issues, notably those relating to the admissibility and validity of respondent's damages model and the district court's restrictive evidentiary rulings, could properly serve as the basis for reversal and remand for a new trial even if they did not result in entry of judgment for petitioner. The decision below casts these issues into the dustbin of "waiver" even though Rule 59 has no requirement of a predicate motion under Rule 50(a). But, as this Court has held, "[t]hey are precisely the kind of issues that the losing defendant below may bring to the court of appeals ***without ever moving for a new trial in the district court***." *Neely*, 386 U.S. at 327 (emphasis added).

Other courts of appeals have held, even where a party has waived the right to request judgment as a matter of law (or judgment n.o.v. under the prior nomenclature), that waiver "does not prevent a party from moving for a new trial under Fed. R. Civ. P. 59(a), alleging that the verdict is against the weight of the evidence." *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 427 (1st Cir.), *cert. denied*, 510 U.S. 993 (1993). In explaining why "motions for directed verdict and judgment n.o.v. are not prerequisites to a motion for a new trial," the Fifth Circuit stated in *Urti v. Transport Commercial Corp.*, 479 F.2d 766, 769 (5th Cir. 1973), that:

> [I]t would be poor judicial husbandry to require counsel ritualistically to move for a directed verdict and judgment n.o.v., regardless of his lack of conviction in their merit, to preserve his right to appeal the denial

> of a new trial. To demand a litany of introductory motions is not only illogical but harks back to the age of writing writs and technical pleading. We conclude that when a new trial is denied we should, by applying the proper appellate standard, review the decision of the district court.

The decision below is totally at odds with that sound approach. Since a Rule 59 motion is not itself a prerequisite to raising trial errors (*e.g.*, evidentiary rulings, jury instructions) on appeal, the Third Circuit's insistence on empty ritual at the expense of substance is all the more incorrect and worthy of review.

IV. IMPORTANT PRACTICAL AND POLICY REASONS STRONGLY SUPPORT THIS COURT'S REVIEW.

Every day, in every federal courthouse, parties, counsel and district judges must contend with litigated issues that may eventually be presented to courts of appeals. In order to preserve full and effective appellate review – on the merits and under the proper standard for scrutiny – it is essential that clear consistent rules govern the preservation of issues for appeal. The Federal Rules, the decisions of this Court, and the decisions of most circuit courts sensibly apply flexible requirements designed to "'facilitate a proper decision on the merits.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962), quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

By opting, incorrectly, for empty technicalities the decision below necessarily promotes proliferation of pointless and unnecessary motions solely to deter the random invocation of waiver by an appellate court. Even worse, in light of petitioner's numerous substantive filings in the district court, the decision below leaves careful parties and

counsel at the mercy of totally unpredictable forfeiture of appeals on the merits.[14] This consequence has a clear and

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[14] The unpredictability with which the Third Circuit invokes waiver is reflected in several recent decisions. At one extreme, squarely in conflict with cases cited in this petition, the Third Circuit has taken an overly parsimonious view in determining whether a predicate Rule 50(a) motion is "*sufficiently specific*" to preserve an issue for appeal. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1173 (3d Cir. 1993) (emphasis in original). *See Yohannon v. Keene Corp.*, 924 F.2d 1255, 1262 (3d Cir. 1991) (holding that failure to move for directed verdict at the close of all the evidence "does more than limit an aggrieved party's remedy to a new trial. In this Circuit, it wholly waives the right to mount any post-trial attack on the sufficiency of the evidence"); *DeMarines, supra.* Sometimes the Third Circuit takes a more pragmatic, flexible approach. *E.g., Greenleaf v. Garlock, Inc.*, No. 97-1820, 1999 U.S. App. LEXIS 7927, at *34 (3d Cir. Apr. 26, 1999) (analyzing circumstances where parties "did not waive their rights under Rule 59 by failing to move under Rule 50 for judgment as a matter of law"); *Horsey v. Mack Trucks, Inc.*, 882 F.2d 844, 845 (3d Cir. 1989) (considering merits of arguments raised initially in a post-trial Rule 59 motion; *Yohannon*, 924 F.2d at 1261-62 (holding that errors at trial other than sufficiency of the evidence may be raised on appeal without having been argued in either a motion for judgment n.o.v. or for a new trial); *Brokerage Concepts, Inc. v. U.S. Healthcare. Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998) (rejecting waiver contention, vacating judgment and remanding for new trial). *See Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 157 (3d Cir. 1995); *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1001 n.5 (3d Cir. 1988) (motion *in limine* preserved issue for appeal). In *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997), the court, accepting the rule of six other circuits, held that where the prevailing party had not objected to appellant's Rule 50(b) motion on the ground that the issue was waived by an inadequate Rule 50(a) motion, appellee's right to defend the judgment on that basis "is itself waived."

disturbing impact on important substantive issues. To draw on just one pertinent example, all of this Court's attention to preserving the reliability of expert evidence presented to jurors[15] would be for naught if district courts fail to discharge their gatekeeper function, and courts of appeals abdicate their supervisory role by eliminating review on the merits.

The issues presented in this case arise with sufficient frequency to warrant this Court's guidance. In other courts of appeals, petitioner would have obtained review on the merits and the judgment in this case would have been reversed. The decision below offers no substantive, supportable justification for the judgment. But, in erroneously finding waiver, the Third Circuit's opinion poses important procedural questions that this Court should resolve.

The upshot of these authorities is that parties litigating at trial, and even on appeal, cannot know which standards of issue-preservation will apply to their case until *after* disposition by the Third Circuit. That is the essence of random caprice: some cases are decided on the merits under the appropriate scope of review and others are relegated to a stricter standard of waiver that forfeits proper appellate consideration. Under such a regime, the statutory entitlement of appeal from a final judgment faces the threat of being reduced to a discretionary exercise of review by the court of appeals. *See, e.g.*, William Glaberson, "Caseload Forcing Two-Level System For U.S. Appeals/ More One-Word Rulings/ Tens of Thousands of Cases Get Limited Review, According to Judges and Scholars," *New York Times*, Mar. 4, 1999, at 1.

[15] *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *GE v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1999

APPENDICES

APPENDIX A

NOT PRECEDENTIAL
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3678, 97-3686

MELLON BANK, N.A.

v.

DELUXE DATA SYSTEMS, INC.;
DELUXE CORPORATION

DELUXE DATA SYSTEMS, INC.,
Appellant at No. 97-3678

MELLON BANK, N.A.
Appellant at No. 97-3686

v.

DELUXE DATA SYSTEMS, INC.;
DELUXE CORPORATION

On Appeal From the United States District Court,
For the Western District of Pennsylvania
(D.C. Civ. No. 95-cv-1768)
District Judge: Honorable Alan N. Bloch

Argued November 19, 1998
Before: McKEE, RENDELL, and MICHEL,* Circuit Judges
(Filed JAN 12, 1999)

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MEMORANDUM OPINION

RENDELL, Circuit Judge

This case is on appeal from a seven week jury trial which resulted in a unanimous verdict in favor of Mellon Bank, N.A. ("Mellon") and against Deluxe Data Systems, Inc. ("Deluxe Data") in the amount of $30 million. For the reasons stated below, we will affirm.

I.

These proceedings are the unfortunate result of a complicated business deal gone bad. In late 1994, Mellon, represented by David Merritt and Jeannine Devine, and

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* Hon. Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Deluxe Data, represented by Thomas McLaughlin, began preliminary negotiations in the hope of working together to submit a bid to secure a federal contract to provide electronic benefits transfer ("EBT") benefits to a group of southern states known as the Southern Alliance of States ("SAS").[1] The government had recently indicated that it was going to release an "Invitation for Expression of Interest" ("IEI") to provide EBT services to the SAS. The potential revenue from the SAS project was enormous, estimated to be worth hundreds of millions of dollars. Following a few months of discussions regarding the project and at Mellon's request, Deluxe Data sent Mellon a letter (the "February 28 letter") stating: "As we discussed last week, Deluxe agrees to team exclusively with Mellon for the Southern Alliance of States EBT IEI response subject to finalizing a Teaming Agreement." On March 14, 1995, at a meeting to start work on the SAS project, Mellon and Deluxe Data executed a "Confidentiality Agreement" restricting the use and dissemination of information provided by Mellon to Deluxe Data in the course of submitting a bid.

Over the next few months, the parties worked together to formulate a detailed response to the SAS IEI, the due date of which was initially June 8, 1995 and was later moved to August 24, and to finalize a bidding or teaming agreement ("Teaming Agreement") between Mellon and Deluxe Data that would define each party's role associated with bidding on and implementing the SAS project. Mellon sent Deluxe Data a draft Teaming Agreement in early May. Deluxe Data responded on June 22 with some amendments and set a target date of July 14 for execution of a final

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[1] EBT is a program organized by the United States Treasury Department that involves the provision of debit cards and the creation of electronic accounts from which recipients of governmental disbursements such as social security and food stamps who do not have bank accounts can then draw their benefits.

Teaming Agreement. On June 29 and 30, representatives of Mellon and Deluxe Data met and discussed, among other things, the finalization of the Teaming Agreement. On July 3, McLaughlin told his superiors at Deluxe Data that a final Teaming Agreement with Mellon was not signed but was "very close."

On July 11, six weeks before the deadline to respond to the IEI, McLaughlin called Merritt and told him that Deluxe Data was terminating its efforts to respond to the SAS IEI with Mellon. On July 12, Deluxe Data claimed that, at that time, they were not planning on submitting a bid for the SAS project with another party. Because of its inability to team with Deluxe Data and its inability to find another teaming partner only weeks before the deadline, Mellon was unable to submit a bid on the SAS project. On August 23, a day before the IEI due date, Deluxe Data notified Mellon that it had teamed with Citibank to bid on the SAS project. Mellon later discovered that McLaughlin had explored the concept of a Citibank/Deluxe Data team as early as June 28, 1995, and had met with Citibank on June 30 regarding teaming together to submit a bid on the SAS project at the same time that Mellon and other Deluxe Data personnel were meeting regarding finalizing their efforts toward submitting a bid on the same project. The Citibank/Deluxe Data team subsequently won the SAS contract.

Mellon initiated this action against Deluxe Data in October 1995 in the Court of Common Pleas of Allegheny County.[2] The case was soon removed to federal court based on diversity jurisdiction. In its amended complaint, Mellon

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[2] Mellon also sued Deluxe Corporation, Deluxe Data's parent corporation, alleging fraudulent and negligent misrepresentation and unfair competition. The court awarded summary judgment on the negligent misrepresentation claim and the jury found no liability on the remaining claims against Deluxe Corporation.

alleged that Deluxe Data (1) breached the Confidentiality Agreement, (2) breached the contract to team exclusively with Mellon to bid on the SAS project subject only to the completion of a teaming agreement, (3) misappropriated Mellon trade secrets and confidential information, (4) fraudulently and negligently misrepresented material information, (5) breached its fiduciary duty to Mellon, (6) tortiously interfered with Mellon's prospective contractual relations, (7) breached its duty of good faith and fair dealing with Mellon, and (8) engaged in unfair competition against Mellon.

Over the course of the seven week trial, Mellon presented numerous witnesses and thousands of pages of documents describing Mellon and Deluxe Data's working together on finalizing the Teaming Agreement and submitting a response to the IEI, and attesting to the likelihood of success of a Mellon/Deluxe Data team and the possible remunerative benefits thereof of up to $70 million. Mellon also presented evidence showing how Deluxe Data agreed to work exclusively with Mellon toward finalizing the Teaming Agreement, and then, only weeks before the IEI response deadline, walked away from the negotiations after striking what Mellon portrayed as a "secret deal" with Citibank. In response to Mellon's charges, the jury awarded a $30 million verdict against Deluxe Data, representing the jury's determination of Mellon's lost profits from the SAS project.[3]

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[3] The jury found the following: (1) there was evidence of a contract to team exclusively and if successful, to submit a bid for the SAS project; (2) Deluxe Data breached this contract; (3) absent such breach, Mellon would have been awarded the SAS contract; (4) Deluxe Data breached the Confidentiality Agreement; (5) Deluxe Data misappropriated trade secrets and/or confidential information; (6) Deluxe Data breached its fiduciary duty to Mellon; (7) absent a breach of its fiduciary duty, Mellon would have been awarded the SAS contract; (8) Deluxe Data

II.

On appeal, Deluxe Data offers several arguments as to why the $30 million verdict against it should not stand. Deluxe Data argues that Mellon's theory of liability is deficient as a matter of law because (1) the February 28 letter was not a contract and did not create an independent duty to negotiate in good faith, (2) the law precludes recovery of future lost profits on prospective government contracts, (3) the law precludes recovery in tort for alleged breaches of contract, (4) Mellon's unfair competition and tortious interference claims are insufficient as a matter of law, and (5) no fiduciary duty existed between the parties. Deluxe Data also argues that Mellon's claims for lost profits on the SAS project are precluded as a matter of law since it was a speculative future contract,[4] and that numerous procedural

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intentionally interfered with Mellon's prospective contractual relations; (9) SAS project engaged in unfair competition; (10) Deluxe Data made fraudulent misrepresentations to Mellon; (11) Mellon did not prove that Mellon would have received the contract absent Deluxe Data's fraudulent misrepresentations. The jury awarded Mellon $30 million dollars in lost profits based on the belief that Mellon would have been awarded the contract absent Deluxe Data's breach of the exclusivity contract and its breach of fiduciary duty, or based on Deluxe Data's intentional interference with Mellon's prospective contractual relations, or based on Deluxe Data's unfair competition resulting from the intentional interference with Mellon's prospective contractual relations. The jury awarded no damages for Deluxe Data's breach of the Confidentiality Agreement, misappropriation of trade secrets and/or confidential information, and its unfair competition resulting from the misappropriation of trade secrets and/or confidential information.

[4] Deluxe Data presents eight arguments as to why the $30 million award was excessive and conjectural. These arguments are as follows: (1) the award is based on assumptions that have no evidentiary basis, (2) the District Court improperly excluded evidence of Mellon's inexperience with EBT services, (3) Pennsylvania law requires an unproven business to show proof of commitments to recover lost profits, (4) Mellon cannot recover lost profits on an unconsummated contract, (5) the conjectural nature of a renewal/option contract precludes lost profits, (6) the District

errors require a new trial.[5] Finally, Deluxe Data argues that the breach of the Confidentiality Agreement, misappropriation of trade secrets, and fraudulent misrepresentation claims, on which the jury found Deluxe Data liable but awarded no damages, are legally insufficient. Mellon also makes several arguments on cross-appeal which we need not address since we will affirm the decision of the District Court. The parties have submitted extensive briefs of their arguments, as well as a forty-two volume appendix. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Before proceeding to the merits of Deluxe Data's arguments, we must deal with Mellon's contention that nearly all of the arguments on appeal were not properly preserved at trial and thus have been waived.[6] *See Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 156 (3d Cir. 1995) (explaining that failure to raise an argument in District Court constitutes waiver of the argument). After a thorough review of the record, we agree with Mellon and conclude that Deluxe Data has waived most of its arguments presented on

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Court failed to discount the award to net present value, (7) the award is against public policy, and (8) the District Court erroneously rejected an appropriate damages analysis.

[5] Deluxe Data argues that there were pervasive mistakes in the jury instructions, that Mellon prejudicially presented documents marked "confidential" for discovery purposes as being confidential documents under the Confidentiality Agreement, that the District Court erroneously ordered Deluxe Data to return to Mellon documents that Mellon had voluntarily produced, and that the District Court erred in refusing to strike a juror for cause whose daughter worked for Mellon.

[6] Mellon contends that Deluxe Data waived all of the aforementioned arguments except for the arguments that the February 28 letter does not constitute a contract, and that the breach of Confidentiality Agreement, misappropriation of trade secrets, and fraudulent misrepresentation claims, on which the jury found Deluxe Data liable but awarded no damages, are legally insufficient.

appeal due to its failure to include these arguments in the appropriate Rule 50 motion, propose jury instructions on certain issues, or object to jury instructions actually given.[7] Deluxe Data has preserved, however, the following arguments: (1) the February 28 letter does not constitute a contract as a matter of law because of the nonoccurrence of a condition precedent, (2) the law precludes recovery in tort for alleged breaches of contract, (3) the tortious interference claim is insufficient as a matter of law because there was no evidence of a prospective contractual relationship, (4) no fiduciary duty existed, (5) lost profits based on the February 28 letter are precluded because there is no causal link between the alleged injury and the damages, (6) jury instructions directing the jury to find a breach of the contract

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[7] Deluxe Data has waived the following arguments: (1) the February 28 letter does not constitute a contract because it was indefinite or because there was no "meeting of the minds," or even if the "subject to" clause was a condition subsequent, (2) the February 28 letter did not create an independent duty to negotiate in good faith, (3) the law precludes recovery of future lost profits on prospective government contracts, (4) the unfair competition claim is insufficient as a matter of law since it is duplicative of the tortious interference claim, (5) the tortious interference claim is insufficient as a matter of law because one cannot tortiously interfere with one's own contract, (6) Mellon's claims for lost profits based on the February 28 letter are precluded because the damages model deviated from the causation theory, (7) all eight arguments regarding the excessive and conjectural nature of the award, and (8) all arguments pertaining to jury instructions except for the objection to instructions indicating that there was a breach of the contract even if the contract had a condition precedent. Deluxe Data waived the first seven arguments listed herein for its failure to include these arguments in its first Rule 50 motion. As to the arguments regarding the excessive and conjectural nature of the award, although Deluxe Data appropriately argued that the jury award was excessive and conjectural in its post-trial Rule 50 motion, it still failed to preserve any of the eight reasons for its excessiveness since these arguments could have been, but were not, made in its first Rule 50 motion. Deluxe Data waived the eighth argument listed herein for its failure to propose relevant jury instructions or to object to relevant jury instructions actually given.

even if the contract had a condition precedent were erroneous, (7) numerous procedural errors, including the marking of documents as confidential, the order to return documents to Mellon, and the refusal to strike a juror, require a new trial, and (8) the breach of the Confidentiality Agreement, misappropriation of trade secrets, and fraudulent misrepresentation claims, on which the jury found liability but no damages, were insufficient as a matter of law. Deluxe Data preserved the first five arguments through mention in its first Rule 50 motion, preserved the sixth listed argument through proposal of a relevant jury instruction, and preserved the seventh listed argument through timely objections at trial. The eighth listed arguments are deemed preserved since Mellon did not sufficiently claim that they were waived.

Deluxe Data's waived arguments are reviewed for plain error. *Fashauer v. New Jersey Transit Rail Operations*, 57 F.3d 1269, 1289 (3d Cir. 1995). Deluxe Data's preserved arguments numbered (1), (2), (3), (4), and (5) are mixed questions of fact and law. We will review all determinations of law de novo but will reverse a finding of fact only if it is clearly erroneous. *IBS Fin. Corp. v. Seidman & Assoc.*, 136 F.3d 940, 945 (3d Cir. 1998). Deluxe Data's objections to the jury instructions and the procedural and evidentiary rulings are reviewed for abuse of discretion, except that any clear misstatements of law are reviewed de novo. *United States v. McGill*, 964 F.2d 222, 235-36 (3d Cir. 1992) (jury instructions); *United States v. Rana*, 944 F.2d 123, 126 (3d Cir. 1991) (procedural rulings); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1213 (3d Cir. 1995) (evidentiary rulings).

We have reviewed all of Deluxe Data's waived arguments as detailed in footnote 7 for plain error. We conclude that the District Court committed no plain error with regard to any of these issues.

Although we will address each of the preserved arguments, we find it useful to start with a discussion of the jury instructions since, if the jury was instructed properly on the law as to issues that were properly before the jury, we need only ask whether there was sufficient evidence such that a rational jury could have decided as this jury did in order to affirm the verdict. *See Dutton v. Wolpoff and Abramson*, 5 F.3d 649, 652 (3d Cir. 1993). Having reviewed the jury instructions in detail, we find that there were no misstatements of law, clear errors, or abuses of discretion in the charge to the jury.[8] Further, we find that, in the course of this seven week trial, during which the jury heard testimony from numerous witnesses, viewed hundreds of exhibits, and was given an adequate statement of the legal standards at issue, there was sufficient evidence for a rational jury to find that the February 28 letter and actions of the parties pursuant thereto gave rise to a contract, Deluxe Data's actions justified recovery based on theories of tort and breach of contract, the tortious interference claim is sufficient as a matter of law, a fiduciary duty existed between the parties, and the awarded damages were sufficiently related to the alleged injury. Further, we find that the District Court did not abuse its discretion as to the claimed procedural and evidentiary errors.

Deluxe Data also argues that the issue of whether the February 28 letter was a contract was a matter that should not have been submitted to the jury but should have been decided by the court as a matter of law since the letter was

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[8] If anything, we find that Deluxe Data may have suffered not from legally erroneous jury instructions, but from its failure to propose that certain jury instructions be given. Having reviewed Deluxe Data's proposed jury instructions, we do not feel that, even if the District Court had given instructions just as Deluxe Data had proposed, that such instructions would have captured the crux of the theory of the case as Deluxe Data now argues it on appeal.

"unambiguous." We review this question of law de novo. *Allegheny Int'l Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1424 (3d Cir. 1994). Pennsylvania law requires that a court interpret unambiguous writings as a matter of law and that a jury only interpret ambiguous writings. *Id.* After a thorough review of all of the evidence, we feel that it was proper for the court in this case to have the jury decide whether a contract was formed since the February 28 letter was ambiguous due to the presence of the "subject to" clause. Although the words "subject to" may indicate a condition precedent, the non-occurrence of which would negate any duties under a contract, this language is not conclusive evidence of a condition precedent and may be considered to be in itself ambiguous. *See Federal Deposit Ins. Corp., v. W.R. Grace & Co.*, 877 F.2d 614, 622 (7th Cir. 1989) (stating that the term "subject to" was ambiguous). Also, although Deluxe Data focuses on the February 28 letter in arguing that there was no contract, Mellon's argument as to the existence of a contract was not limited to that document alone, but was based on other statements and actions of the parties that preceded, and followed, it. Thus, the court properly left the question of the existence of a contract to the jury.

Finally, Deluxe Data argues that the breach of the Confidentiality Agreement claim, the misappropriation of trade secrets claim, and the fraudulent misrepresentation claim, on which the jury found liability but no damages, were insufficient as a matter of law and thus cannot form the basis of the judgment and also should be excluded from further proceedings in the event a new trial is ordered. However, since the verdict was not based on the breach of the Confidentiality Agreement claim, the misappropriation of trade secrets claim, or the fraudulent misrepresentation claim, our basis for affirming the verdict does not reach the merits of these claims. Since we will not order a new trial, we need not address the legal sufficiency of these arguments.

III.

For the reasons stated above, we will affirm the jury verdict awarded in the District Court granting Mellon $30 million in lost profits based on Deluxe Data's breach of the contract to team exclusively with Mellon and Deluxe Data's breach of its fiduciary duty to Mellon.

TO THE CLERK OF THE COURT:

Please file the foregoing Memorandum Opinion.

/s/ Marjorie O. Rendell
Circuit Judge

DATED:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MELLON BANK, N.A.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 95-1768
	)	
DELUXE DATA SYSTEMS, INC., and DELUXE CORPORATION,	)	
	)	
Defendants.	)	

ORDER

AND NOW, this 26th day of June, 1997, upon consideration of Defendant's Motion for Summary Judgment (document No. 88) filed in the above captioned matter on October 11, 1996, and upon further consideration of Plaintiff's Response thereto,

IT IS HEREBY ORDERED that said motion is GRANTED in part and DENIED in part, to wit:

1. Said motion is GRANTED as to Counts V and IX of the amended complaint;

2. Said motion is GRANTED as to Count X of the amended complaint, to the extent that it is brought against Deluxe Corporation; and

3. Said motion is DENIED in all other aspects.

I. Summary judgment standard

Summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against any party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir. 1990).

The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (en banc), *cert. dismissed*, 483 U.S. 1052 (1987). Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that "the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial." *Id.*; *Celotex*, 477 U.S. at 322.

II. Discussion

A. Negligent misrepresentation

Count V of the amended complaint sets forth a cause of action for negligent misrepresentation against Deluxe Data and Deluxe Corporation. Defendants have moved for

summary judgment on this count, arguing that Pennsylvania law bars recovery in a negligent misrepresentation action where the only damages sought are economic losses. The Court agrees.

Under the economic loss doctrine, first discussed by the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), the recovery of damages in tort is limited. In such cases, "it is the character of the plaintiff's loss that determines the nature of the available remedies." *Duquesne Light Co. v. Westinghouse Electric Corp.*, 66 F.3d 604, 618 (3d Cir. 1995) (*citing King v. Hilton-Davis*, 855 F.2d 1047, 1051 (3d Cir. 1988)). "Purely economical loss, when not accompanied with or occasioned by injury, is considered beyond the scope of recovery even if a direct result of [a] negligent act." *Margolis v. Jackson*, 543 A.2d 1238, 1240 (Pa. Super. 1988).

> [Indeed,] [t]o allow a cause of action for negligent cause of purely economic loss would be to open the door to every person in the economic chain of the negligent person or business to bring a cause of action. Such an outstanding burden is clearly inappropriate and a danger to our economic system.

Id. (*citing Aikens v. Baltimore and Ohio Railroad Co.*, 501 A.2d 277, 279 (Pa. Super. 1985)).

Although the economic loss doctrine was initially limited to product liability cases, its application has been widely extended and it is now commonly applied to simple negligence claims, as well as to claims for negligent misrepresentation. *See, e.g., Eagle Traffic Control v. Addco*, 882 F.Supp. 417, 419 (E.D. Pa. 1995) (court applied economic loss doctrine to negligent misrepresentation claim); *Palco Linings, Inc. v. Pavex, Inc.*, 755 F.Supp. 1269, 1271-

77 (M.D. Pa. 1990) (court applied economic loss doctrine to negligence and negligent misrepresentation claims). Moreover, the existence of privity of contract between the parties, or the lack thereof, is not necessarily dispositive on the potential application of the doctrine. *See Duquesne Light*, 66 F.3d at 620 (court applied economic loss doctrine where there was privity of contract between the parties); *Palco*, 755 F.Supp. at 1275 (court applied economic loss doctrine notwithstanding the fact that no privity of contact existed between the parties).

Applying the law to the facts of the instant case, the Court finds that plaintiff's negligent misrepresentation claim fails as a matter of law because plaintiff is seeking damages solely for economic losses; namely, for response costs and lost revenues. (*See* Amended Complaint, p.27; Plaintiff's Expert Reports (document no. 81)). For this reason, the Court will grant defendants' motion for summary judgment insofar as it relates to Count V of the amended complaint.[9]

B. Breach of the covenant of good faith and fair dealing

Count IX of the amended complaint sets forth a cause of action for breach of the covenant of good faith and fair dealing against Deluxe Data. Deluxe Data has moved for summary judgment on this count, arguing that no such

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[9] Although defendants also request summary judgment under the economic loss doctrine on Counts III, IV, VII, IX and X of the amended complaint—that is, on plaintiff's claims for misappropriation and misuse of trade secrets and confidential information, fraudulent misrepresentation, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and unfair competition—defendants have failed to point the Court to any law whatsoever in support of this argument. Summary judgment on these claims based upon the economic loss doctrine would, thus, clearly be inappropriate.

independent cause of action exists under Pennsylvania law. Again, the Court agrees.

The Restatement (Second) of Contracts §205 provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 701 (3d Cir. 1993).

> [Moreover,] [i]n the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract. Accordingly, a promise to do an act necessary to carry out the contract must be implied.

Id. (*citing Daniel B. Van Campen Corp. v. Building and Construction Trades Council*, 195 A.2d 134, 136-37 (Pa. Super. 1963)).

Although a viable cause of action can thus be based upon an alleged breach of an implied duty of good faith and fair dealing, as evidenced above, such a cause of action has been recognized by the Commonwealth of Pennsylvania only in limited situations. *See Parkway Garage*, 5 F.3d at 701. Pennsylvania courts have typically refused to uphold a claim for breach of an implied duty of good faith and fair dealing when the plaintiff has stated another viable cause of action arising out of the same set of underlying facts. *See Bicycle Corporation of America v. Meridian Bank*, Civ. A. No. 95-6438, 1995 WL 695090, at *4 (E.D. Pa. November 21, 1995) (*citing D'Ambrosio v. Pennsylvania National Mutual*

Casualty Insurance Co., 431 A.2d 966, 968-71 (Pa. 1981); *Creeger Brick and Building Supply Inc. v. Mid-State Bank and Trust Co.*, 560 A.2d 151, 154-55 (Pa. Super. 1989)); *see also Parkway Garage*, 5 F.3d at 701. In such cases, where a plaintiff already has an adequate remedy at law, either in tort or in contract, there is no need to create a separate cause of action for breach of an implied duty of good faith and fair dealing. *See Parkway Garage*, 5 F.3d at 701.

Such is the case in the instant matter. Indeed, plaintiff's claim for breach of the covenant of good faith and fair dealing is but one of ten counts asserted in plaintiff's amended complaint, all arising out of the same set of underlying facts. Because its remaining causes of action afford plaintiff a more than adequate remedy at law in this case, the Court will grant defendants' motion for summary judgment insofar as it relates to Count IX of the amended complaint.

C. Unfair competition

Count X of the amended complaint sets forth a cause of action for unfair competition against Deluxe Data and Deluxe Corporation. Defendants have moved for summary judgment on this count, arguing that no facts exist to support such a claim against either defendant. As to Deluxe Corporation, the Court agrees.

Pennsylvania courts have repeatedly recognized the viability of unfair competition claims based on allegations of trademark infringement and/or misappropriation of trade secrets. *See, i.e., Renee Beauty Salons, Inc. v. Blose-Venable*, 652 A.2d 1345, 1347 (Pa. Super.), *appeal denied*, 661 A.2d 874 (Pa. 1995). Because plaintiff has produced a substantial amount of evidence that Deluxe Data misappropriated its alleged trade secrets, the Court finds that

plaintiff has sustained its summary judgment burden as to the unfair competition claim against this defendant.

In support of its unfair competition claim against Deluxe Corporation, however, plaintiff states only the following:

> After Deluxe Data wrongfully terminated its exclusive partnership with Mellon, Deluxe Data misappropriated . . . confidential information jointly prepared by the parties and used it to assist a competitor of Mellon and to cripple Mellon's ability to submit a competing bid. . . . Assisting Deluxe Data in this scheme was Deluxe Corporation, who reviewed and heard confidential information about the status of negotiations and plans developed with Mellon and approved Deluxe Data's decision to walk away from Mellon and to use Mellon as a bargaining chip for a greater role with Citibank in the SAS and NCS . . . This conduct is contrary to honest business and commercial practices and constitutes unfair competition.

(*See* Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 102). Plaintiff has produced no evidence that Deluxe Corporation misappropriated any alleged trade secrets belonging to the plaintiff. Plaintiff, however, argues that Pennsylvania law allows an unfair competition claim to be based, alternatively, upon actions such as those taken by Deluxe Corporation; namely, upon "actions purposefully taken to cripple and destroy an integral part of a competitive business organization." *See Boyce v. Smith-Edwards-Dunlap Co.*, 580 A.2d 1382, 1390 (Pa. Super. 1990), *appeal denied*, 593 A.2d 413 (Pa. 1991).

Although this theory appears to be reasonable, the Court is not convinced that it is, in fact, the law in Pennsylvania. *See, e.g., Jules Jurgensen/Rhapsody, Inc. v. Rolex Watch U.S.A., Inc.*, Civ. A. No. 85-5605, 1987 WL 9276, at *3 (E.D. Pa. April 9, 1987) (court refuses to expand unfair competition theory to cover conduct demonstrating that the defendant's intent was to unfairly compete with the plaintiff by seeking to cripple the plaintiff's presence in a particular industry); *In re Brand Name Prescription Drugs Antitrust Litigation*, No. 94 C. 897, M.D.L. 997, 1995 WL 144396, at *2 (N.D. Ill. March 29, 1995) (*citing* same). Even assuming, however, that plaintiff's interpretations of Pennsylvania law are correct, the Court finds that plaintiff still has not produced sufficient evidence to withstand summary judgment on its claim of unfair competition against Deluxe Corporation.

First, considering the minor role that Deluxe Corporation played in the alleged scheme which forms the basis of the amended complaint, the Court finds that any actions taken by that defendant cannot realistically amount to "actions purposefully taken to cripple and destroy an integral part of a competitive business organization." *Boyce*, 580 A.2d at 1390. Moreover, contrary to plaintiff's assertions, the mere fact that Deluxe Corporation was privy to and reviewed certain information regarding Deluxe Data's business affairs with the plaintiff cannot render Deluxe Corporation liable for Deluxe Data's independent actions, taken through the exercise of its own business judgment.

Accordingly, because plaintiff has failed to direct the Court's attention to sufficient evidence of record in support of its unfair competition claim against Deluxe Corporation, the Court will grant defendants' motion for summary judgment insofar as it relates to that portion of Count X of the amended complaint brought against that defendant.

D. Remaining claims

Defendants raise various arguments in support of their request for summary judgment on each of plaintiff's remaining claims—that is, its claims for breach of contract (Counts I and II), misappropriation and misuse of trade secrets and confidential information (Count III), fraudulent misrepresentation (Count IV), promissory estoppel (Count VI), breach of fiduciary duty (Count VII) and tortious interference with prospective contractual relations (Count VIII). Viewing the facts in a light most favorable to the non-moving party, however, the Court finds that there are indeed genuine issues of material fact in dispute with regard to all of these claims. For this reason, the Court will deny defendants' motion for summary judgment insofar as it relates to Counts I, II, III, IV, VI, VII and VIII of the amended complaint.

/s/ Alan N. Bloch
United States District Judge

cc: Mary J. Hackett and Thomas McGough, Jr., Esquires
Mellon Square, 435 Sixth Avenue, Pittsburgh, PA 15219

Jennifer Wilson Hewitt, Esquire
58th Floor, USX Tower, Pittsburgh, PA 15219

APPENDIX C

[District Court's Oral Denial of Deluxe Data's Motion *in Limine*]

[Trial Transcript, Sept. 15, 1997] [CA App. A1656]

THE COURT: Now, we get to Defendants' motions now. One is to exclude the Plaintiff's expert report. Generally expert's reports don't come into evidence. The expert testifies, but their reports don't come into evidence because their reports are hearsay. So does that take care of it?

MS. HEWITT [counsel for Deluxe Data]: Your Honor, I think that takes care of it on one level. But there is a report of one of their experts, the competitiveness report, as Mellon calls it, of Mr. Mass. It's simply Defendants' position that there is absolutely no foundation for that document, and under Daubert it is nothing more than junk science and would actually confuse --

THE COURT: I can't determine that until I hear the witness testify.

MS. HEWITT: I understand, Your Honor.

THE COURT: Okay. So we won't rule on that now. That's your second one on competitiveness?

MS. HEWITT: Correct, Your Honor.

THE COURT: So that takes care of the first two.

APPENDIX D

[District Court's Oral Denial of Deluxe Data's Rule 50(a) Motion at Close of Plaintiff's Case]

[Trial Transcript, Oct. 6, 1997] [CA App. A2933-A2938]

THE COURT: Go ahead with your motions.

MS. HEWITT [counsel for Deluxe Data]: Your Honor, at this time, the defendants would move for judgment as a matter of law on all of the counts asserted against Deluxe Data, and the count that is asserted against Deluxe Corporation.

If I might begin, the basis, of course, is that viewing all of the evidence that has come in in plaintiff's case in chief in a light most favorable to the plaintiff, it is the defendant's position that there is insufficient evidence for a reasonable jury to find liability on the claims as pled.

The first cause of action, the only claim against Deluxe Corporation is fraudulent misrepresentation. Based upon the evidence presented in plaintiff's case in chief, defendants submit that the only conversation or statement by a Deluxe Corporation representative -- and this comes primarily through Mr. McGuinn -- was the conversation he had with Mr. Blanchard. At that time, anything, according to the evidence taken in a light most favorable to Mellon, from Mr. McGuinn, anything that Mr. Blanchard stated was true, and Mr. McGuinn was quite clear that, according to him, all

he could recollect Mr. Blanchard saying was that he was evaluating the EBT business, and if Deluxe Data were to win with Citibank, they would stay in. If not win, they would possibly get out. That statement was true --

THE COURT: You are misstating the evidence. Those were two separate statements that are alleged to be Mr. Blanchard, and that's not what the evidence was. The evidence was that he originally said we are going to -- I just became chairman, and we are going to step back and look at all of this and decide whether this is a business we even want to be in, something to that effect. That has -- that's entirely separate from the statement that he made that if we win, we're going to going to stay in, and if we lose, we are not.

MS. HEWITT: And, Your Honor, it is defendant's position that the statements that Mr. Blanchard made to Mr. McGuinn were true when stated, and the fact that --

THE COURT: I know that's your position.

Your motion is denied.

MS. HEWITT: With regard to the remaining claims, I'll take them in order. With regard to Count 1, breach of the confidentiality agreement, there has been no evidence by Mellon that there was any damage that resulted to Mellon Bank from any alleged breach of the confidentiality agreement. There has been no evidence --

THE COURT: What are the damages for breach of a confidentiality agreement? Do you have some law on that?

MS. HEWITT: Well, Your Honor, the point is that we have had no testimony regarding any causation between --

THE COURT: Do you have any law on what the damages are for breach of a confidentiality agreement?

MS. HEWITT: No, I don't have any with me at this time, Your Honor.

THE COURT: How do you expect me to rule on the judgment when you have no law to give me? Wouldn't it be a possible damage that if somebody uses your confidential information and makes a profit because of that, you should be entitled to take that profit away from them?

MS. HEWITT: But, Your Honor, the defendant's point is that there has been no testimony presented during Mellon's case in chief to show how that information was allegedly misused. There has been no testimony it was given to any third party.

THE COURT: There has been. There has been evidence. There has been evidence that there were direct information taken out of Mellon Deluxe documents and put into Citibank Deluxe documents.

MS. HEWITT: Your Honor --

THE COURT: There has been evidence of that.

Your motion is denied.

MS. HEWITT: I'll make the motion, but I have a feeling, in light of the Court's ruling on the last one, that the ruling on the misappropriation of trade secrets would be the same with regard to the evidence. We would simply move for judgment as a matter of law on that count against Deluxe Data.

THE COURT: That's denied.

MS. HEWITT: We would similarly move for judgment as a matter of law on count, I believe it's two, which is the breach of contract for the teaming agreement on the basis that there has been no evidence that --

THE COURT: That is not my understanding of one of the causes of action on the teaming agreement. They are claiming two contract causes of action. One, that you breached the agreement to partner together, having nothing to do with the Teaming Agreement, that the agreement -- that the agreement that was reached orally and by way of the letter saying that we will -- we will be partners.

MS. HEWITT: And Your Honor --

THE COURT: And the second -- okay.

MS. HEWITT: I was just going to say, I may have lapsed into a shorthand method of referring to it as the Teaming Agreement.

THE COURT: I understand the Teaming Agreement to be something separate which neither side is claiming was ever entered into.

MS. HEWITT: Well, Your Honor, it's defendant's position that some of the Mellon witnesses have tried to characterize the February 28 letter as an agreement to partner on the project, as opposed to submit a bid, to team together to submit a bid. And so from that standpoint, that is the basis for characterization of a Teaming Agreement. But, the motion for judgment as a matter of law would be with regard to the breach of contract claim arising from the February 28th letter, however one wish wishes to characterize it.

THE COURT: That's right. And that's denied.

MS. HEWITT: Your Honor, I believe the remaining claims for promissory estoppel, tortious interference with respect to contract and unfair competition that exist against Deluxe Data are all derivatives of the other claims that we have already discussed, and I would simply move for judgment as a matter of law on those claims, as well.

THE COURT: That's denied.

Now, I take it that you are also moving for judgment as a matter of law on the punitive damage claim?

MS. HEWITT: Yes, Your Honor.

THE COURT: Plaintiffs seek to recover punitive damages against defendant. The Court of Appeals for the

Third Circuit has specifically recognized that punitive damages in general represent a limited remedy to be reserved for special circumstances. Despite its utility as a deterrent, the punitive damage remedy must be reserved for cases in which the defendant's conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief.

Therefore, in order to justify an award of punitive damages against defendant, plaintiff must demonstrate that the conduct of defendant was outrageous. Conduct is outrageous where a plaintiff demonstrated that a defendant's actions were done with an evil motive or with a reckless indifference to the interest of others. Assessment of punitive damages are proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful or wanton or reckless conduct.

The Court finds that plaintiffs have presented insufficient evidence of their claim for punitive damages against defendants to enable a reasonable jury to find in plaintiff's favor.

Therefore, the Court is granting judgment as a matter of law to defendant with regard to plaintiff's claim for punitive damages.

APPENDIX E

[District Court's Oral Denial of Deluxe Data's Rule 50(a) Motion at Close of Evidence]

[Trial Transcript, Oct. 23, 1997] [CA App. A4091]

MS. HEWITT [counsel for Deluxe Data]: Your Honor, before defense rests, can we approach side bar for one moment with regard to a ministerial issue?

(At side bar.)

MS. HEWITT: Your Honor, I didn't want to do this in the presence of the jury, but prior to actually resting, we have a motion and brief in support thereof renewing our motion for judgment as a matter of law, and I simply wanted to get that on the record prior to resting.

THE COURT: Sure; they're denied.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MELLON BANK, N.A.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 95-1768
	)	
DELUXE DATA SYSTEMS, INC., and DELUXE CORPORATION,	)	
	)	
Defendants.	)	

ORDER

AND NOW, this 17th day of November, 1997, upon consideration of Defendant's Post-Trial Motion for Judgment as a Matter of Law, a New Trial, a Stay Pending Appeal, and Other Relief (document No. 255) filed in the above captioned matter on November 14, 1997,

IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ Alan N. Bloch
United States District Judge

cc: Mary Hackett, Esquire
Mellon Square, 435 Sixth Avenue, Pittsburgh, PA 15219

Jennifer Wilson Hewitt, Esquire
58th Floor, USX Tower, Pittsburgh, PA 15219

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3678, 97-3686

MELLON BANK, N.A.
v.
DELUXE DATA SYSTEMS, INC.;
DELUXE CORPORATION

DELUXE DATA SYSTEMS, INC.,
Appellant at No. 97-3678

MELLON BANK, N.A.
Appellant at No. 97-3686
v.
DELUXE DATA SYSTEMS, INC.;
DELUXE CORPORATION

On Appeal From the United States District Court,
For the Western District of Pennsylvania
(D.C. Civ. No. 95-cv-1768)
District Judge: Honorable Alan N. Bloch

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, and MICHEL,* Circuit Judges,

* Hon. Paul R. Michel, Circuit Judge for the Federal Circuit, sitting by designation.

SUR PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by appellant Deluxe Data Systems, Inc. having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: FEB 18, 1999

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3678, 97-3686

MELLON BANK, N.A.

v.

DELUXE DATA SYSTEMS, INC.;
DELUXE CORPORATION
DELUXE DATA SYSTEMS, INC.,
Appellant at No. 97-3678

MELLON BANK, N.A.
Appellant at No. 97-3686

v.

DELUXE DATA SYSTEMS, INC.;
DELUXE CORPORATION

On Appeal From the United States District Court,
For the Western District of Pennsylvania
(D.C. Civ. No. 95-cv-1768)
District Judge: Honorable Alan N. Bloch

Argued November 19, 1998
Before: McKEE, RENDELL, and MICHEL,*
Circuit Judges

*Hon. Paul R. Michel, Circuit Judge for the Federal Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Corut for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on November 19, 1998.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the orders of the District Court entered on November 17, 1997 in 97-3678 and October 30, 1997 in 97-3686 are hereby affirmed.

Costs taxed against appellants.

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: JAN 12, 1999

Certified as a true copy and issued in lieu of a formal mandate on February 26, 1999.

Teste: /s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

Pursuant to Rule39(d), FRAP, COSTS Taxed IN FAVOR OF Mellon Bank added hereto on
May 13, 199[9], as follows:

Brief . . . . . $190.80 /s/ PDS 5/13/99

APPENDIX I

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions decided by the motion. The movant may renew its request for

judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

****

Rule 59. New Trials; Amendment of Judgments.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in any action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . . .

****

(d) **On Court's Initiative; Notice; Specifying Grounds.** No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in that motion, the court shall specify the grounds in its order.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MELLON BANK, N.A.,	)	CA No. 95-1768
	)	
Plaintiff,	)	Judge Alan N. Bloch
	)	Magistrate Judge
vs.	)	Francis X. Caiazza
	)	
DELUXE DATA SYSTEMS, INC., and DELUXE CORPORATION,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants, Deluxe Data Systems, Inc. ("Deluxe Data") and Deluxe Corporation, (collectively referred to hereinafter as the "Defendants") pursuant to Federal Rule of Civil Procedure 50(a) make the following Motion for Judgment as a Matter of Law on all remaining counts of Plaintiff's Complaint and in support thereof state as follows:

1. By virtue of prior rulings of this Honorable Court, including the granting of summary judgment as to certain of Plaintiff's claims, and judgment as a matter of law regarding punitive damages at the conclusion of Plaintiff's case-in-chief, the claims remaining in this litigation are as follows: Count I, Breach of the March 14, 1995 Confidentiality Agreement against Deluxe Data; Count II, Breach of an "exclusive teaming arrangement" against Deluxe Data; Count III, Misappropriation of Trade Secrets

against Deluxe Data; Count IV, Fraudulent Misrepresentations against Deluxe Data and Deluxe Corporation; Count VI, Promissory Estoppel against Deluxe Data; Count VII, Breach of Fiduciary Duty against Deluxe Data; Count VIII, Tortious Interference with Prospective Contract against Deluxe Data; and Count X, Unfair Competition against Deluxe Data. Furthermore, Plaintiff continues to claim damages of lost revenues from the Southern Alliance of States ("SAS") Project, lost profits from other EBT projects, out-of-pocket expenses incurred by Plaintiff in anticipation of bidding on the SAS Project, and disgorgement of profits.

2. Defendants are entitled to judgment as a matter of law as to each and every claim asserted by Plaintiff because no reasonable jury, viewing all of the evidence in the light most favorable to Plaintiff, could find for Mellon.

3. Rule 50(a) provides: "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

4. A motion for judgment as a matter of law should be granted only if, "viewing all evidence in favor of the nonmoving party, no reasonable juror could find liability on a particular point." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir. 1995) cert.denied, 510 U.S. 917 (1993).

5. Although judgment as a matter of law is to be granted sparingly, the non-movant is required to establish more than a "scintilla of evidence" to survive a properly

supported motion. *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978). "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." *Id.* Furthermore, the non-movant's evidence must satisfy the standards of proof required for each claim. *Wittekamp*, 991 F.2d at 1141-1142.

6. In the present action, Plaintiff's failure to meet its burden of proof for elements of every cause of action it asserts as well its claims for damages requires this Court to grant Defendants' Motion for Judgment as a Matter of Law for the following reasons:

A. On Count IV - Fraudulent Misrepresentation Claim Against Deluxe Corporation because:

1. Plaintiff cannot prevail on its claim for fraudulent misrepresentation which is based upon a single affirmative statement made by Deluxe Corporation about future plans of its subsidiary, Deluxe Data in the electronic benefits transfer ("EBT") industry because:

a. Plaintiff has failed to set forth sufficient evidence that it justifiably relied, to its detriment, on statements made by Deluxe Corporation;

b. Plaintiff has failed to put forth any evidence that Deluxe Corporation had the requisite intent to mislead Plaintiff; and

c. Plaintiff has failed to set forth sufficient evidence that statements made by Deluxe Corporation were false.

2. Plaintiff cannot maintain a claim of fraud against Deluxe Corporation for failing to inform Plaintiff that Deluxe Data was negotiating with Citibank because there is no evidence to support a determination that Deluxe Corporation had an affirmative duty to inform Plaintiff of this fact.

B. On Count IV - Fraudulent Misrepresentation Claim against Deluxe Data because Plaintiff has failed to present any evidence that any of the statements made by Deluxe Data employees were false when they were made or that Deluxe Data acted with the requisite scienter.

C. On Count I - Breach of the Confidentiality Agreement because Plaintiff has failed to offer sufficient evidence that Deluxe Data breached the Confidentiality Agreement for the following reasons:

1. There has been no proof presented at trial that information that Plaintiff allegedly provided to Deluxe Data is "confidential" as defined by the Confidentiality Agreement or that Deluxe Data used or divulged this information; and

2. Plaintiff has failed to proffer any evidence of a causal link between the alleged breach of the Confidentiality Agreement and actual pecuniary injury.

D. On Count II - Breach of the Alleged "Exclusivity Agreement" because Plaintiff has failed to set forth sufficient evidence to demonstrate the existence, and/or breach of an alleged "exclusivity agreement" contained in a February 28, 1995 letter for the following reasons:

1. No exclusivity agreement was ever consummated because the condition precedent to the agreement to team exclusively was never satisfied;

2. The February 28, 1995 letter was not an acceptance of Mellon's alleged offer to team exclusively but instead proposed additional terms or conditions and thus constituted a counter-offer which was never accepted by Mellon;

3. Evidence concerning whether the February 28, 1995 letter constituted an exclusivity agreement is barred by the parole evidence rule because Mellon and Deluxe Data entered into a subsequent confidentiality agreement which expressly stated that an exclusivity agreement would not exist until finalization and execution of a Teaming Agreement;

4. Plaintiff's claim of an alleged breach of the "exclusivity agreement" amounts to no more than an alleged breach of an agreement to agree and does not entitle Mellon to recover lost profits from a project for which no agreement was reached. Mellon accordingly, has failed to set forth sufficient evidence of the actual pecuniary loss it suffered as a proximate result of the alleged failure to negotiate in good faith; and

5. If Plaintiff were entitled to recover lost profits from the SAS project, the alleged lost profits should be limited to the profits from the Direct Federal EBT portion of the SAS EBT Project.

E. On Count III - Misappropriation of Trade Secrets and Count X - Unfair Competition because:

1. plaintiff has failed to set forth sufficient evidence that it provided information that rises to the level of a trade secret or that this information qualifies as such under the terms of the Confidentiality Agreement. Furthermore, Mellon has failed to identify with particularity any instance where Deluxe Data actually used information shared by Mellon with any third party.

F. On Count VI - Promissory Estoppel because Plaintiff has failed to identify a promise,

definite in nature, sufficient to prove a claim for promissory estoppel. Additionally, to the extent that Plaintiff bases its reliance claim of promissory estoppel upon the February 28, 1995 letter, its claim is redundant of its breach of contract claim and therefore, cannot be pursued.

G. On Count VII - Breach of Fiduciary Duty because there is insufficient evidence to prove that Deluxe Data had the type of business relationship with Mellon which would impose a fiduciary duty upon Deluxe Data.

H. On Count VIII - Tortious Interference with Prospective Contractual Relations because:

1. Plaintiff has proffered no evidence of an independent tortious act other than claiming a breach of contract;

2. The award of a competitive government contract is too speculative to be a prospective contract and Plaintiff's evidence of a prospective contract is insufficient;

3. The evidence cannot support the finding that Deluxe Data intended to harm Plaintiff; and

4. Plaintiff has failed to offer evidence that could reasonably support a finding that Deluxe Data was not justified in ending its negotiations with Plaintiff.

For the foregoing reasons, Defendants, Deluxe Data Systems, Inc. and Deluxe Corporation respectfully request their Motion for Judgment as a Matter of Law be granted.

Respectfully submitted,

Dated: October 23, 1997

/s/Jennifer Wilson Hewitt

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APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MELLON BANK, N.A.,	)	Civil Action No. 95-1768
	)	
Plaintiff,	)	Judge Alan n. Bloch
	)	Magistrate Judge Francis
v.	)	X. Caiazza
	)	
DELUXE DATA SYSTEMS, INC., and DELUXE CORPORATION,	)	
	)	
Defendants.	)	

DEFENDANT'S POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW, A NEW TRIAL, A STAY PENDING APPEAL, AND OTHER RELIEF

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TABLE OF CONTENTS

I. INTRODUCTION

II. THIS COURT SHOULD GRANT JUDGMENT FOR DELUXE DATA ON ALL OF MELLON'S CLAIMS AS A MATTER OF LAW

A. Mellon's damages fail due to lack of causation and lack of injury

B. The claimed breach of the confidentiality agreement is not supported by the evidence

C. The claimed breach of the February 28 letter "contract" is not supported by the evidence

D. The breach of fiduciary duty claim is contradicted by the evidence and the law

E. The claim of intentional interference with a prospective contract should be dismissed

F. The claim of unfair competition should be dismissed

III. A NEW TRIAL SHOULD BE ORDERED ON ALL OF MELLON'S CLAIMS

A. The damages award is wildly excessive and based on sheer speculation

B. The jury instructions were erroneous

1. The jury instructions regarding damages were in error

2. **The Court improperly shifted the burden to Deluxe Data regarding the law of condition precedent/condition subsequent**

3. **The repeated instructions regarding "an agreement to submit a bid and, if successful, to implement that bid" usurped the jury's function**

4. **The letter of intent instruction was erroneous**

5. **The breach of fiduciary duty instruction incorrectly stated the law**

6. **The lost profits instruction incorrectly stated the law**

7. **The jury should been instructed regarding the economic loss doctrine**

C. **Errors in the Court's evidentiary rulings require a new trial**

1. **Errors regarding "confidential" documents**

2. **Deluxe Data was improperly denied use and access to Mellon's allegedly inadvertently produced documents**

D. **The Court erred in refusing to strike juror number 12 for cause**

IV. IN THE ALTERNATIVE, THIS COURT SHOULD ORDER REMITTUR OF THE AWARD

V. A STAY OF EXECUTION AND FURTHER PROCEEDINGS IS APPROPRIATE AND NECESSARY TO AVOID PREJUDICE TO DELUXE DATA'S RIGHTS

VI. CONCLUSION

DEFENDANT'S POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW, A NEW TRIAL, A STAY PENDING APPEAL, AND OTHER RELIEF

Pursuant to Federal Rules of Civil Procedure 50 and 59, defendant Deluxe Data Systems, Inc. ("Deluxe Data" or "Defendant") respectfully (i) renews its motion for entry of judgment as a matter of law in its favor on each claim of plaintiff, Mellon Bank, N.A. ("Plaintiff" or "Mellon"); (ii) in the alternative, moves for a new trial; and (iii) in the event the Court does not grant any of the foregoing relief, moves the Court to disallow or reduce the jury's award of compensatory damages or, in the alternative, moves for a new trial on damages. Deluxe Data also moves pursuant to Rule 62, Fed. R.Civ.Pro. for a stay of execution of the judgment pending resolution of this motion and any appeal.

I. INTRODUCTION

This litigation began with a simple one-page, three-sentence letter sent by Thomas McLaughlin of Deluxe Data to David Merritt of Mellon, on February 28, 1995, two knowledgeable business people engaged in arms-length commercial negotiations (the "February 28" letter). In that letter, Mr. McLaughlin conditionally offered to team exclusively with Mellon if the parties could work out a mutually satisfactory teaming agreement. Although negotiations towards this agreement were actively conducted over the next several months, it is uncontroverted that a final, binding and definitive contract was never signed. Frustrated by its lack of progress with Mellon, Deluxe Data instead determined to serve as a subcontractor for Citibank, N.A. ("Citibank") in connection with its bid for the Southern Alliance of States Electronic Benefit Transfer ("EBT") Project (the "SAS Project"). Citibank ultimately won this award.

Spurned and angry, Mellon commenced this litigation. First, Mellon alleged that Deluxe Data misused Mellon's "confidential information" in contravention of a March 14, 1995 Confidentiality Agreement between the parties. Unfortunately for Mellon, because it had no experience or expertise whatsoever in the EBT business, it had no valuable confidential information to share with Deluxe Data and the jury in this action rightfully awarded Mellon no damages on this claim or on the related component of the claim of unfair competition.

Realizing that it could not identify a single item of "confidential" information that it shared with Deluxe Data, Mellon sought another ground through which it could exorcize its apparent feelings of rejection. Seizing upon the February 28 letter, Mellon argued that this letter was a contract to team exclusively and negotiate in good faith towards an exclusive teaming agreement and, despite the testimony of its own witnesses to the contrary, for the first time in its supplemental jury instructions, characterized this alleged agreement as subject to a condition subsequent. The letter, however, says nothing of the sort. It is nonsense to argue that the parties agreed on the terms and conditions of their contract, subject to a condition subsequent that they agree on the terms and conditions of their contract.

But Mellon goes even further. Mellon argues that the hypothetical "contract" that supposedly existed (if only the parties could agree on its terms) somehow transmogrified the relationship between Mellon and Deluxe Data from an arms-length commercial negotiation to an exclusive, confidential joint venture. Accordingly, under Mellon's view, Deluxe Data owed a fiduciary duty -- the highest duty implied by law -- to guide helpless Mellon through the EBT wilderness.

This is an amazing and pernicious theory. Under the "Mellon Rule," each party in a commercial negotiation has a fiduciary duty that requires it to subvert its own interests to those of the other. The "Mellon Rule" is a prescription for commercial paralysis. Under Mellon's view, no joint venture contract could ever be concluded because each side will be duty bound to reject any provisions proffered by the other that could conceivably act to its advantage and to the detriment of its "partner." As a matter of law, however, Mellon's claim of breach of fiduciary duty is nonsense; no such duty can arise prior to the execution of a definitive joint venture agreement. It is undisputed that no such agreement exists here.

Mellon stretches its preposterous contentions even further. It goes on to claim that Deluxe Data strung Mellon along in fruitless negotiations with the secret intention of defeating Mellon's ability to bid on the SAS Project. But there is no evidence to support Mellon's contentions. The most Mellon should have been able to assert at trial is that Deluxe Data breached an agreement to agree. Even if that were the case, and it is not, Mellon's claims for unfair competition and tortious interference would still have to be dismissed as a matter of law because a breach of contract does not give rise to a claim in tort.

In short, this case is nothing more than a poorly built house of cards. The entire structure rests on but one premise -- that the February 28 letter was an agreement by Deluxe Data to team exclusively with Mellon to submit a bid for the SAS Project and, if successful, to implement the project. But the verdict awarding $30 million on this premise is directly contrary to the evidence presented by the parties at trial. Neither party argued the existence of any agreement to actually implement the SAS Project. Indeed, Mellon's own construction of Section 7 of the Confidentiality Agreement is that no such implementation agreement could or would exist

in the absence of the relevant definitive documentation. In these circumstances, the jury verdict must be vacated and judgment entered in favor of Deluxe Data.

Further, the verdict awarded to Mellon, an untested novice in the EBT industry, is an indefensible windfall that dramatically and inexplicably exceeds by several multiples the profits projected by Citibank for the SAS Project, under which Citibank, an experienced EBT provider, is to provide services that Mellon admits it cannot. This grossly excessive verdict cannot stand. It is vulnerable to successful attack on numerous grounds, including:

No future profits on unsigned contracts. Pennsylvania law precludes lost future profits in these circumstances. Under governing state law, lost profits may not be awarded based upon estimates from unsigned contracts. Moreover, Pennsylvania law requires a higher standard of proof for a new or incipient business seeking lost profits. Furthermore, Mellon's claims were not properly submitted to the jury under these settled standards of law. *See* p. 7-8, *infra*.

Mellon's damages are speculative. Contrary to established principles of causation, Mellon was permitted to seek hypothetical lost future profits for contracts that were far too uncertain as to their execution and remote in time to support any damages. Whether Mellon would have obtained the initial SAS contract with the federal government, whether Mellon then would have reached individual agreements with any of the SAS states, what services each state would opt to utilize, and whether each individual state then would have exercised the option period to later extend the contracts are speculative. Each of those critical links in the chain of causation and alleged injury required discretionary decision making by third parties that were entirely independent of Mellon and Deluxe Data. The result is a theory of causation

and damage that is far too attenuated under the law to permit damages on either contract or tort claims. *See* p. Id; 17-19, *infra*.

Failure to discount future damages to net present value. Contrary to established Pennsylvania law and economic reality, the jury was precluded from calculating the present value of the hypothetical lost future profits Mellon was claiming for a period that extends years into the future. The failure to discount damages to present value invalidates the award of damages. *See* p. 19, *infra*.

Failure of proof. Undisputed facts in the record illustrate the absence of legal or factual support for this grossly excessive verdict:

- Mellon had **never** before provided EBT services and admitted that it lacked the experience to match Citibank and others.

- The prospects for a successful bid by neophyte Mellon (even with Deluxe Data as a subcontractor) were uncertain and highly conjectural.

- Citibank, an experienced EBT provider, projected future profits of only $6 to $10 million on the same government business on which the jury awarded Mellon $30 million. Moreover, Citibank is providing services that Mellon admitted it is incapable of providing and, therefore, Mellon could not possibly earn even $6 to 10 million let alone $30 million.

- Mellon failed to submit evidence of its costs of providing services under the government contracts it hypothetically would have obtained and the revenues it expected to receive for providing those services. Furthermore, Mellon conceded that at least one of the states included in Mellon's damages calculation had dropped out of the SAS group, but Mellon's flawed damages calculation was never modified to reflect this fact.

- Mellon failed to mitigate its alleged damages by not attempting to team with any other entity to submit a bid for the SAS Project after Deluxe Data ended the negotiations.

In short, even if there were any basis for liability in this case, which there is not, the verdict rewards Mellon with conjectural "lost profits" that are flagrantly divorced from commercial reality. This flawed verdict must be set aside. Indeed, the Third Circuit has noted that the Pennsylvania Supreme Court is "skeptical of claims for lost profits by a 'new and untried business,'" and the Third Circuit has reversed jury verdicts and directed entry of judgment N.O.V. in similar cases where claims of lost profits lacked the requisite concrete evidentiary basis. *Advent Systems, Ltd. v. Unisys Corp.*, 925 F.2d 670, 680 (3d Cir. 1991); *National Controls Corp v. National Semiconductor Corp.*, 833 F.2d 491 (3d Cir. 1987).

Accordingly, the Court should enter judgment in favor of Deluxe Data because Mellon's hyperattentuated theory of liability is contrary to governing liability, causation and injury standards. Alternatively, the Court should grant a new trial on all issues because errors at trial infected the

result; even absent those errors, the weight of the evidence is so conclusively to the contrary that the verdict is a miscarriage of justice and cannot stand. At the very least, the Court should grant a remittitur confining damages within the realm of sound economic analysis that a correctly-instructed jury could reasonably consider, or alternatively order a new trial on damages. *See* pages 30-33, *infra*.

II. THIS COURT SHOULD GRANT JUDGMENT FOR DELUXE DATA ON ALL OF MELLON'S CLAIMS AS A MATTER OF LAW.

Deluxe Data is entitled to a judgment as a matter of law because Mellon failed to meet its burden of proof on each of its claims on which the jury awarded damages, as well as on the amount of damages.[10]

A. Mellon's damages fail due to lack of causation and lack of injury.

Deluxe Data is entitled to judgment as a matter of law on all of Mellon's claims for damages because Mellon failed to prove the essential elements of causation and injury in fact. Specifically, Mellon did not offer evidence from which a jury reasonably could find that any conduct by Deluxe Data, including the alleged breach of contract, was a substantial cause of its inability to realize lost profits on the various SAS contracts. *Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*, 462 A.2d 686, 695 (Pa. Super. 1983) ("[s]ufficient evidence must be introduced to permit a

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10 All of the bases on which the jury may have reached its $30 million verdict against Deluxe Data (including the remaining element of unfair competition resting on interference with prospective contractual relations) require proof by Mellon that it would have been awarded the SAS Project.

reasonably certain estimate of the amount of anticipated profits lost due to the breach"). Indeed, as to some elements of its damages methodology, Mellon offered nothing more than conjecture and speculation, while as to other elements of its methodology Mellon offered nothing whatsoever. Among other things:

(1) **No evidence that Mellon would have won the SAS Project.** Mellon failed to offer sufficient evidence from which a reasonable jury could find that Mellon would have been awarded the SAS Project. Mellon's damages expert, Erik Skramstad, admitted that he failed to perform an independent analysis of the other bids submitted for the SAS Project in connection with his "lost profits" damages analysis, but rather relied on the unsupported speculation of Mellon's representatives that they "believed" that Mellon would have been awarded the SAS Project. (Oct. 6, 1997, T.T. pp. 143-145). Moreover, Dominick Cavuoto testified only that he personally believed Mellon's and Deluxe Data's chances of winning the SAS Project \were "as good" as Citibank's. (Sept. 30, 1997, T.T. p. 90, lines 8-13). However, Mr. Cavuoto then demolished the predicate for even this unsupported guesswork when he later admitted that his testimony was speculative and based solely upon industry rumor. (Sept. 30, 1997, T.T. p. 135, line 24 to p. 141, line 15; Sept. 30, 1997, T.T. p. 142, line 15 to p. 143, line 18). Mellon's failure to offer evidence is fatal in light of the heavy burden that Pennsylvania law imposes on parties seeking lost profits on contracts not yet

consummated. *Larstone Corrugated Carton Co. v. First Seneca Bank & Trust Co.*, 1988 U.S. Dist. LEXIS 13842 (W.D. Pa. Dec. 5, 1988)("Pennsylvania law indicates that lost profit damages should not be awarded in most cases where the profits are based upon estimates from unsigned contracts"). *See also National Controls*, 833 F.2d at 498 (refusing to award lost profits on an unexecuted contract).

(2) **Damages from unawarded government contracts are speculative.** As recognized by the primary forum for the litigation of government contract cases, an award of a government contract is inherently speculative. *Solar Turbines, Inc. v. U.S.*, 16 Cl. Ct. 304, 317 (1989). *See also Rocky Mountain Constr. Co.*, 218 Ct. Cl. 665 (1978). As such, the failure to obtain a government contract cannot form a basis for lost profits. *See Ellsworth Associates, Inc. v. U.S.*, 917 F. Supp. 841, 849 (D.D.C. 1996) (no bidder to a government contract "has a right to a government contract prior to its award"); *Savini Constr. Co. v. Crooks Brothers Constr. Co.*, 540 F.2d 1355 (9th Cir. 1974). Even if Mellon had successfully cleared the hurdles that all other actual bidders faced, winning the federal contract only entitled Mellon to pursue additional opportunities for other state governmental contracts within the SAS.

(3) **No evidence that Mellon would have entered into contracts with the States.**

Mellon offered no evidence that it would have been able to enter into contracts with each of the states. Rather, Skramstad's damages theory assumed, without any evidence in the record, that Mellon would have been able to enter into contracts with each of the states in the SAS Project. In direct contrast to his unsupported assumption, Skramstad admitted that the awardee of the SAS contract had to sign each state to a contract and that a state could unilaterally decide at any time to reject a proposed contract and not participate in the SAS Project. (Oct. 6, 1997, T.T. pp. 156-157).

(4) **The option years make the damages award too speculative.** Conclusive record evidence substantiates that the SAS contracts included option years and that it is impossible to assume that any awardee of the SAS Project would have been able to sign the states for the full seven years, including all option years. *See, e.g., Birge v. Toppers Menswear, Inc.*, 473 S.W.2d 79, 86 (Tex. Ct. App. 1971) (damages based on profits from renewal periods too speculative); *Hole v. Unity Petroleum Corp.*, 131 P.2d, 150, 154 (Wash. 1942) (same). Skramstad's damages methodology simply assumed, without a scintilla of evidence, that Mellon would have been able to sign each of the respective states for the full seven years. (Oct. 6, 1997, T.T. p. 146, line 19 to p. 148, line 24). Thus, no reasonable jury could have found that Mellon would have successfully implemented any aspect of the SAS Project.

(5) **Profits from a new business venture are speculative.** Mellon failed to satisfy its higher burden to establish lost profits for a new business by failing to offer *substantial* evidence that it would have realized profits on the SAS Project, despite the fact that EBT was a new business venture in which Mellon had no prior experience. *Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*, 462 A.2d 686, 695 (Pa. Super. 1983)(complainant must submit "substantial" evidence to recover lost profits on a new business); *Advent Sys., Ltd. v. Unisys Corp.*, 925 F.2d 670, 681 (3d Cir. 1991) ("[p]redicting the results of business dealings that might have but never did occur is of course a difficult matter of proof"). Mr. Skramstad assumed without any evidentiary basis that Mellon would have realized the same profit margins under the SAS Project as Citibank. (Oct. 6, 1997, T.T. p. 126, line 13 to p. 127, line 20). Even on this basis, Skramstad's figures were vastly greater than Citibank's own estimates.

(6) **No evidence of damage from Mellon's tort claims.** Mellon failed to offer evidence from which a reasonable jury could have concluded that Mellon suffered any lost profits as a result of the alleged breach of the confidentiality agreement or alleged misappropriation. *National Controls*, 833 F.2d at 496 (entitlement to a damages award requires sufficient evidence that lost profits were proximately caused by the breach of contract. The damages must be a "proximate consequence of the breach, not merely remote

or possible" and the plaintiff has the burden of proving that the defendant's breach was a "substantial factor in causing some harm") (citations omitted).

B The claimed breach of the confidentiality agreement is not supported by the evidence.

Mellon's failure of proof on its claim that Deluxe Data breached the confidentiality agreement (Count I) includes the following defects:

(1) **No confidential information as defined by Mellon's Confidentiality Agreement.** Mellon failed to prove that information which it allegedly provided to Deluxe Data is "confidential" as defined by the Confidentiality Agreement or that Deluxe Data used or divulged Mellon's confidential information. *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3d Cir. 1995) ("[I]ntent of the parties to a written contract is contained in the writing itself.") The determination of what information is and is not confidential is to be determined by the language in the agreement. *See Bell Fuel Corporation v. Cattolico*, 544 A.2d 450, 460 (Pa. Super. 1988), *appeal denied*, 554 A.2d 505 (Pa. 1989); *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214, 1224 (Pa. Super. 1989).[11]

(2) **No evidence of confidential information relating to implementation.** Under Mellon's reading of section 7 of the Confidentiality Agreement (*see* testimony of Sharon Murtha, Sept. 29, 1997, T.T. p. 135, lines 8-20. pp. 136, line 20 to p. 137, line 17), the "confidential information"

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[11] Mellon drafted the Confidentiality Agreement. Any ambiguities in a writing are to be construed against the drafter. *Central Transp., Inc. v. Board of Assessment Appeals of Cambria County*, 417 A.2d 144 (Pa. 1980).

protected by that agreement is limited to information regarding "Mellon's EBT service plans." Given Mellon's argument that the February 28 letter is not superseded by section 7 of the Confidentiality Agreement because that section should be read only to mean that the parties would not be bound by any agreement actually to provide EBT services until definitive implementation agreements were signed, it follows that "Confidential Information" cannot consist of information relating to the preparation of the bid or the associated negotiations. No information regarding Mellon's actual implementation of EBT services was provided to Deluxe Data and, therefore, Deluxe Data could not have breached the Confidentiality Agreement.[12] Furthermore, any ambiguity in the Confidentiality Agreement should, as a matter of law, be resolved in favor of Deluxe Data because the Agreement was drafted by Mellon.

C. The claimed breach of the February 28 letter "contract" is not supported by the evidence.

Mellon's breach of contract claim based upon the alleged "exclusivity agreement" as memorialized in the February 28 letter from Thomas McLaughlin of Deluxe Data to David Merritt of Mellon fails for the following reasons:

(1) **No agreement to implement.** As a matter of law, the jury could not find that the parties entered into an agreement to "team exclusively to submit a bid for the Southern

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12 Mellon's claims under Count III (misappropriation), Count IV (fraudulent misrepresentation), Count VII (breach of fiduciary duty), Count VIII (tortious interference with prospective contractual relations) and Count X (unfair competition) are all based upon an alleged breach of the Confidentiality Agreement. Because Mellon offered no evidence of any act independent of an alleged breach of contract, these claims are barred, as a matter of law, by the economic loss doctrine.

Alliance of States Project and, if successful, to implement the project" because both parties agreed that there was never any agreement to implement. Indeed, plaintiff's own reading of Section 7 of the Confidentiality Agreement, which Mellon drafted, precludes a finding that an implementation agreement would exist before the parties executed and delivered the required definitive written documentation.[13]

(2) **Condition precedent not satisfied.** No reasonable jury could have concluded that an exclusivity agreement was ever consummated because the condition precedent to the agreement's existence as expressly identified in the February 28 letter (a finalized teaming agreement) was never satisfied. Both parties agree that a teaming agreement was never finalized. *See* 17 Am. Jur. 2d Contracts § 466 (1991) ("the employment of such words as . . . 'subject to' usually indicates that a promise is not to be performed except upon a condition or the happening of a stated event"); *see also Burgess Constr. Co. v. Morrin & Son Co.* 526 F.2d 108, 113 (l0th Cir.), *cert. denied*, 429 U.S. 866 (1976) ("The words 'subject to'

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13 *See* trial testimony of Sharon Murtha, Sept. 29, 1997, p. 137, lines 5-17 (emphasis added): "What I am saying here [in the Confidentiality Agreement] is the agreement with respect to the transaction, or if you put in that definition, is actually providing services, has not yet been executed and delivered and that, for example, one party isn't obligated to go market, the other party isn't obligated to sign contracts, get all the contracts signed with all the states. How we will actually provide the services and get the federal benefits to all the recipients is something that has not been reached because of this agreement."

usually indicate a condition to one party's duty of performance and not a promise by the other").

(3) **Counter-offer was never accepted.** Because the February 28 letter added additional terms and conditions, it constituted a counter-offer which was never accepted by Mellon. *See* Restatement (Second) of Contracts §59 ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer").

(4) **Question of law, not fact.** As a matter of law, the language of the February 28 letter was not ambiguous and, therefore, its interpretation was to be determined as a matter of law and was not a question of fact. *See Allegheny Intern., Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1424 (3d Cir. 1994) ("[u]nder Pennsylvania law, ambiguous writings are interpreted by the fact finder and unambiguous writings are interpreted by the court as a questions of law"); *see also Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107 (3d Cir. 1994). The Court should not have submitted to the jury the condition precedent - condition subsequent issue. Further, the language in section 7 of the Confidentiality Agreement clearly and unambiguously operates to supersede and eliminate the February 28 letter, and the Court

should not have allowed the jury to base its decision on a contrary premise.

(5) **No meeting of the minds.** As a matter of law, there can be no contract in the absence of a meeting of the minds on all essential terms. Mellon failed to put forth evidence establishing that all of the essential terms of an exclusive teaming agreement were reached. Accordingly, no reasonable jury could have found that there was a meeting of the minds as to the essential terms, or that all conditions precedent to its formation and performance were met. Moreover, the Court should have found as a matter of law that there was no "exclusivity agreement" because the purported contract, predicated on the February 28 letter, has absolutely no specifics defining the respective rights, duties and responsibilities of the parties and, thus, is no contract at all. *See M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387 (W.D. Pa. 1988); *Channel Home Centers v. Grossman*, 795 F.2d 291 (3d Cir. 1986).

(6) **No intent to be bound.** When the parties do not intend to be bound until a formal written agreement is finalized, approved and signed, there can be no contract. The evidence proves that the parties did not intend to be bound until a formal written document was finalized, approved by the parties' legal counsel, and signed, none of which ever occurred.

(7) **Not an exclusivity agreement.** Evidence concerning whether the February 28 letter constituted an exclusivity agreement is barred as a matter of law by the parol evidence rule because Mellon and Deluxe Data entered into a subsequent confidentiality agreement which expressly stated that an exclusivity agreement would not exist until finalization and execution of a Teaming Agreement. *Mellon Bank Corp v. First Union Real Estate Equity & Mortgage Investments*, 750 F. Supp. 711, 714 (W.D. Pa. 1990), *aff'd*, 951 F.2d 1399 (3d Cir. 1991) (Whether a writing is the complete statement of the agreement is to be determined by examining the writing itself. If "it is couched in such terms as to import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of this undertaking were reduced to writing."). Further, according to Sharon Murtha, Mellon's counsel and author of the March 14 Confidentiality Agreement, Section 7 of the Confidentiality Agreement limits the parties' alleged undertaking in the February 28 letter to the submission of a bid and expressly provides that no definitive agreement to provide EBT services existed between Mellon and Deluxe Data to implement the SAS Project even if they won the bid. (Sept. 29, 1997, T.T. p. 135 lines 8-20, and p. 136, line 20 to p. 137, line 17). Thus, Mellon failed to prove that elements essential for any claim of breach of an "exclusivity agreement" existed, and the

jury's verdict with respect thereto is not supported by the record.

(8) **Tautology.** Applying the novel condition subsequent analysis advanced by Mellon, the February 28 letter can only be read as meaning, in effect, that Deluxe Data agreed to team exclusively with Mellon to respond to the SAS Project, unless Deluxe Data and Mellon could not agree to do so. A tautology then arises because the asserted condition subsequent to the purported agreement is the fact of agreement itself. If the parties had agreed to team exclusively on February 28, 1995, based on the jury charge, the alleged condition subsequent to such agreement (the successful negotiation of an exclusive teaming agreement) must have been satisfied at that point. Such a conclusion would, however, render the "subject to finalizing a teaming agreement clause a nullity. As a matter of law, a condition subsequent to the existence of a contract cannot be the agreement of the parties to the terms and conditions of the contract.[14]

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[14] Deluxe Data also moves for judgment as a matter of law relief on Count III of Mellon's claim (misappropriation of trade secrets) and Count X (unfair competition) because: (a) Mellon failed to put forth Swith particularity any instance where Deluxe Data actually misappropriated, misused or disclosed Mellon information; and (c) Mellon offered no direct evidence of the specific confidential information allegedly misused, misappropriated or disclosed by Deluxe Data in submitting a bid with Citibank. Mellon's claims amount to no more than unreasonable and impermissible speculation, which could not and did not satisfy Mellon's burden of proof. *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827 (8th Cir. 1996) (it would be unreasonable to infer that every time a company receives confidential information, it uses that information if it negotiates

D. The breach of fiduciary duty claim is contradicted by the evidence and the law.

Mellon failed to present sufficient evidence from which a reasonable jury could conclude that Deluxe Data had the type of business relationship with Mellon that would impose a fiduciary duty upon Deluxe Data. As established by the record, this was an arms-length business transaction between two independent companies, each trying to negotiate an agreement that was favorable to its respective business and financial interests. To the contrary, a fiduciary duty arises when one party obligates itself to act in or on behalf of the interest of another. *See Snellbaker v. Herrman*, 462 A.2d 713 (Pa. Super. 1983). No evidence was offered by Mellon that Deluxe Data had agreed to assume this extraordinary relationship and to subordinate its business interests to those of Mellon. Thus, the claim that Deluxe Data had agreed or was willing to agree to suppress its business interests and needs to those of Mellon's has no evidentiary support.

This Court cannot let stand a finding that there is a fiduciary obligation between two commercial business entities in the context of a negotiation between those entities. To do so is contrary to established law and common sense, because each party is, by definition, negotiating in accordance with self-interest. A fiduciary relationship could exist only, if at all, in the context of performing some mutually agreed joint venture activity. In this case, however, the record fails to establish that a joint venture could have

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with another entity); *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1266 (7th Cir. 1992). Deluxe Data also moves for relief on Count IV (fraudulent misrepresentation) because Mellon failed to present clear and convincing evidence from which a reasonable jury could conclude that any of the statements made by Deluxe Data's employees were false when they were made or that Deluxe Data acted with the requisite scienter.

existed in the absence of a definitive agreement to bid on and perform the SAS contract or at all within the parameter of the prime contractor/subcontractor relationship. Sharon Murtha, Mellon's counsel, testified at trial that the March 14 Confidentiality Agreement, which she drafted, makes clear that no definitive agreement to actually provide EBT services ever existed between Mellon and Deluxe Data, even if Mellon won the bid. *See* Testimony of Sharon Murtha, Sept. 29, 1997, T.T. p. 135, lines 8-20 and p. 136, line 20 to p. 137, line 17.

Under Pennsylvania law, a joint venture is an entity created by contract. *Wilkins v. Heebner*, 480 A.2d 1141, 1144 (Pa. Super. 1984). The parties' actions and statements throughout their course of dealing demonstrated that they understood that a signed agreement was required. No reasonable jury could have found there was a meeting of the minds on all essential terms of the alleged joint venture or that all conditions precedent to its formation and performance were met.

To prevail on its breach of fiduciary duty claim, Mellon had the explicit burden of proving four additional elements of a joint venture by a preponderance of the evidence. These elements include the precise contributions each party was going to make to the project in the way of services, skills and money, and exactly how the profits or losses would be shared between the parties. Mellon utterly failed to prove these required elements.

Furthermore, under the Invitation for Expressions of Interest ("IEI") issued for the SAS Project, the United States Treasury Department ("Treasury") required that a bank, such as Mellon, submit any bid for the Project. As such, any bid submitted by Deluxe Data and Mellon as joint venturers would have been rejectable as nonresponsive to the IEI. The IEI's specifications then necessitated that Mellon confirm in

writing for Treasury that Mellon was capable of and prepared to assume the lead -- not a backseat -- on bidding for, winning and implementing the SAS Project.[15] As such, the nature of the IEI itself precluded Mellon and Deluxe Data from establishing a joint venture agreement. Mellon's written representation to Treasury that it was capable of assuming and, indeed, intended to assume the lead role of prime contractor precludes a finding of a joint venture.

E. The claim of intentional interference with a prospective contract should be dismissed.

As a matter of law, Deluxe Data could not have tortiously interfered with any prospective contract Mellon purportedly had with the federal government or the states participating in the SAS Project, as Mellon claimed in Count VIII. The award of a competitive contract is, as a matter of law, too speculative to be a prospective contract. *Ellsworth Associates, Inc. v. U.S.*, 917 F. Supp. 841 (D.D.C. 1996) (no bidder to a government contract "has a right to a government contract prior to its award"); *Savini Construc. Co. v. Crooks Bros. Construc. Co.*, 540 F.2d 1355 (9th Cir. 1974). In addition, Mellon makes no showing that Deluxe Data had the requisite intent to thwart Mellon's ability to bid.

Moreover, there is insufficient evidence for a reasonable jury to find that Deluxe Data tortiously interfered with a prospective contractual relation of Mellon's. Among other things:

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[15] As established at trial (Merritt Direct, Sept. 23, 1997 T.T. p. 167 lines 22-25 through p. 168, lines 1-2), this was the very objection of the Transactive Corporation, an EBT processor that pursued litigation to halt the IEI process so that non-financial institutions could bid on the SAS Project as the prime contractor.

(1) **Breach of contract is not a tort.** Mellon proffered no evidence of an independent tortious act other than claiming a breach of contract. This is insufficient as a matter of law to support a claim for tortious interference with prospective contractual relations. *USX Corporation v. Prime Leasing, Inc.*, 988 F.2d 433, 440 (3d Cir. 1993) ("[b]reach of contract, without more, is not a tort").

(2) **No intent to cause harm.** Mellon failed to present sufficient evidence from which a reasonable jury could conclude Deluxe Data's conduct was motivated by an intent to harm Mellon. *Glenn v. Point Park College*, 272 A.2d 896, 899 (Pa. 1971) (tortious interference requires proof that the defendant acted with the specific "purpose of causing harm to plaintiff").

(3) **Legitimate purpose.** Mellon has failed to offer evidence from which a reasonable jury could conclude that Deluxe Data was not justified in ending its negotiations with Mellon. *Glenn*, 272 A.2d at 899 (when a party acts to protect some legitimate purpose, its actions are privileged).

F. The claim of unfair competition should be dismissed.

Mellon's claim regarding unfair competition consists of two elements: misuse of confidential information and interference with prospective contractual relations. For reasons stated above with respect to each of these elements, Mellon's claim for unfair competition should be dismissed.

III. A NEW TRIAL SHOULD BE ORDERED ON ALL OF MELLON'S CLAIMS.

Even if the Court concludes that Mellon did not suffer a total failure of proof on essential elements, Deluxe Data would still be entitled to a new trial because the great weight of the evidence favors Deluxe Data. Unless a new trial is granted, the windfall verdict in favor of Mellon would result in a "miscarriage of justice." *Lind v. Schenley Industries*, 278 F.2d 79, 89 (3d Cir.) (*en bane*), *cert. denied*, 364 U.S. 835 (1960). Pursuant to Federal Rule of Civil Procedure 59, a new trial also is warranted because of substantial errors in the admission or exclusion of evidence, the excessive jury verdict, and errors in the Court's instructions to the jury. *Marder v. Conwed Corp.*, 75 F.R.D. 48 (E.D. Pa. 1971).

A. The damages award is wildly excessive and based on sheer speculation.

The Court should order a new trial because the jury's award of damages to compensate Mellon for its alleged lost profits is grossly excessive. Mellon's claim of lost profits was purely speculative and not based upon any credible evidence from which the jury could reasonably conclude that Mellon had incurred damages in the amount of $30 million. The Court's errors in evidentiary rulings regarding damages include the following:

(1) **Mellon's expert speculated, and Deluxe Data's expert was forbidden from criticizing it.** In order for Mellon to have realized any lost profits on the SAS Project as described in Skramstad's damages analysis, Mellon would have had to, at a minimum: (1) been awarded the SAS Project, (2) signed all of the states to contracts, and (3) signed all of

the states for the full seven years. The Court permitted Mellon's damages expert, Skramstad, to base his damages analysis on the assumptions that all of those events would have occurred. Yet the Court erred by refusing to allow Deluxe Data to elicit testimony from its damages expert, Mark Wolk, concerning the various factors that would have affected Mellon's likelihood of obtaining the SAS contract, the possibility that Mellon would have successfully negotiated a contract with a particular state, or that the contract with a particular state would have been for less than seven years. (Oct. 23, 1997, T.T. pp. 71 -76).

(2) **Prohibition of essential cross examination.** The Court erred by refusing to allow Deluxe Data to cross-examine Mr. Skramstad about his failure to consider the impact of Mellon's lack of EBT experience on its prospects for winning the SAS Project, and what services a state would choose to utilize. (Oct. 6, 1997, T.T. pp. 174-175).

(3) **Restrictions on showing Mellon's EBT inexperience.** A party seeking to recover lost profits on a new business must present "substantial evidence as to its entitlement." *Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*, 462 A.2d 686, 695 (Pa. Super. 1983) (finding that a complainant must submit "substantial" evidence to recover lost profits on a new business). Accordingly, the Court erred by refusing to allow Deluxe Data to

elicit testimony from Mark Wolk concerning Mellon's lack of EBT experience and the impact this lack of experience would have had on Mellon's profitability under the SAS Project. (Oct. 23, 1997, T.T. pp. 73-76).

(4) **Reality contradicted Mellon's speculation.** The Court erred by refusing to admit Deluxe Data's evidence regarding the actual performance of the SAS Project after the alleged breach of contract. This allowed Mellon and its damages expert to make inaccurate and misleading damage projections and resulted in a windfall to Mellon which put it in a better position than it would have been in had Deluxe Data's asserted wrongs never occurred. *See Advent Systems Ltd.*, 925 F.2d at 681-82 (criticizing trial court for allowing plaintiff's expert to testify on projected lost profits where actual market sales were lower than rosy projections).

(5) **Pro forma estimates contradicted by actual data.** In contrast to the exclusion of Deluxe Data's evidence relating to the SAS Project's actual performance, the Court erroneously allowed Mellon to introduce and make misleading arguments from pro forma projections of profit margins and documents referred to as "DIOTs" made before any bids were submitted by any parties.[16]

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16 For example, Mellon claimed that it had reached an agreement with Deluxe Data to bid an average price of $1.00 per case month for its and Deluxe Data's services to transfer benefits to food stamp recipients, and that this average price dictated all other prices that Mellon would

Furthermore, Deluxe Data did provide evidence at trial that Citibank expected to earn only $6 to $10 million from the SAS Project as a result of bidding $1.03 for its services. (Oct. 7, 1997 T.T. at p. 106, lines 9-25). Accordingly, even assuming Mellon would provide the same services as Citibank, which Mellon admits it could not, Mellon could not have earned the $30 million suggested by the jury's verdict if Mellon had actually bid less than Citibank.

(6) **No evidence of discounting to present value.** The Court erred by precluding Mr. Wolk from testifying about discounting to present value any award for lost profits, the fact that profits on EBT projects are generated at the end of the contract periods and not immediately from the point of award, and the factors which must be considered in determining the proper discount rate.

(7) **Lost profits are conjectural.** Mellon has not pointed to any Pennsylvania case permitting an award of lost profits for conjectural periods beyond the initial contract term. Other jurisdictions disallow lost profits damages in option periods because such contentions are too speculative to support a verdict. *See e.g,*

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allegedly bid with Deluxe Data for the SAS Project. However, assuming, *arguendo*, that $1.00 per case month for transferring food stamps to recipients had been agreed to by Mellon and Deluxe Data, there is no evidence of record as to how the profits from these services were to be divided between the parties or of the costs involved in implementing the various tasks outlined in any of the "DIOTs."

Birge v. Toppers Menswear, Inc., 473 S.W.2d 79, 86 (Tex. Ct. App. 1971) (verdict set aside for lost profits during renewal periods following initial five-year lease; damages during renewal period were "in the realm of conjecture, speculation or opinion not founded on facts" and produced a verdict that was "excessive and unreasonable under the circumstances"); *Hole v. Unity Petroleum Corp.*, 131 P.2d 150, 154 (Wash. 1942) (rejecting lost profits damages claim for renewal period following one-year distribution contract: "Even if we assume that [plaintiff] would have chosen to extend the contract, it would not be possible to determine with reasonable certainty what, if any, profit he would have realized during the second year").

B. The jury instructions were erroneous.

In addition or alternatively, a new trial should be granted on each of Mellon's claims because of the errors in the Court's instructions to the jury.[17] Among other things:

1. The jury instructions regarding damages were in error.

The runaway verdict is attributable in large measure to the Court's failure to properly instruct the jury regarding the appropriate measure of damages. These errors included:

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[17] Deluxe Data raised multiple objections to the jury charge and the verdict form before they were provided to the jury. (*See e.g.*, Oct. 27, 1997, T.T. p. 93, lines 6-22). In addition, a new trial motion may be granted even if an objection is made after trial, if the error that is objected to is so fundamental that it caused a miscarriage of justice. *Marder v. Conwed Corp.*, 75 F.R.D. 48 (E.D. Pa. 1977).

(a) **Erroneous jury instruction regarding discounting to present value.** The Court erred by refusing to instruct the jury that an award of lost profits must be discounted to present value. (Oct. 6, 1997, T.T. p. 32; Oct. 23, 1997, T.T. pp. 91-93). Pennsylvania law specifically requires damage awards of lost profits to be discounted to present value. *See e.g., Carpenter Technology Corp. v. Armco, Inc.*, 800 F. Supp. 215, 226 (E.D. Pa. 1992) (stating that *Kaczkowski* has no bearing on or application to this case involving breach of contract for royalties). The Court also erred in refusing to instruct the jury on discounting and failing to include a line on the verdict form.[18]

(b) **No limitation on lost profits.** The contract Mellon would have entered into, even if it was the successful bidder, merely would have authorized it to act as the financial agent of the U.S. Treasury Department ("Treasury"). No evidence was offered from which a reasonable jury

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[18] The Court's stated basis for precluding any calculation of net present value incorrectly analogized the damage award in this case to lost earnings. The Court's premise is incorrect for four reasons. *First*, this case involves an allegedly fixed contract at a fixed price, which does not adjust upward with inflation. *Second*, it ignores the up-front losses parties experience while implementing an EBT project. *Third*, it ignores the extended wait to receive eventual profits. (Oct. 23, 1997, T.T. p. 93). *Fourth*, each state could elect to decline to exercise its option to extend its contract into the option years. (Oct. 7, 1997, T.T. pp. 101-102).

could conclude that Mellon would have successfully negotiated the state contracts or what the terms of those contracts would have been.

(c) **Reliance damages.** The Court erred by instructing the jury both in the charge and in the verdict form that Mellon could recover lost profits when only reliance damages would be recoverable if Deluxe Data had breached an agreement to negotiate exclusively toward an agreement to submit a bid, as Mellon repeatedly claimed before and during the trial. *See Trosky v. Civil Service Comm'n*, 652 A.2d 813 (Pa. 1995); *Keystone Diesel Engine Co. v. Irwin*, 191 A.2d 376, 378 (Pa. 1963) (when a contract is breached, the injured party is entitled to receive damages that naturally flow from the breach which were "reasonably foreseeable and within the contemplation of the parties at the time they made the contract").

2. The Court improperly shifted the burden to Deluxe Data regarding the law of condition precedent/condition subsequent.

The Court erred in rejecting the last sentence of Deluxe Data's Proposed Instruction No. 30 and in failing to instruct the jury that when a contract is subject to a condition, that condition must occur prior to the parties becoming obligated to perform their respective duties or responsibilities, those duties or responsibilities do not have to be performed until and unless the condition is met.

Automotive Mgt. Systems, Inc. v. Tire Service Co., Inc., 1989 U.S. Dist. LEXIS 1388 (E.D. Pa. Feb. 10, 1989), *aff'd.*, 887 F.2d 260 (3d Cir. 1989); *Acme Markets, Inc. v. Federal Armored Express, Inc.*, 648 A.2d 1218 (Pa. Super. 1994). Instead, the jury was charged with reaching a legally flawed and erroneous determination:

> If you find that the subject to phrase is not clearly written as a condition precedent, you should presume it not to be a condition precedent, unless you find that the parties' intentions were to the contrary.

Jury Charge, p.19. Not only did the instruction that was given invite the jury to make a finding that was contrary to the evidence (namely, that the parties would implement the SAS contract, if awarded), but it also incorrectly shifted the burden of proof on this issue from Mellon to Deluxe Data.

On October 22, 1997, Mellon filed its Trial Brief in support of its Supplemental Jury Instructions ("Mellon's Supplemental Jury Instructions") in response to this Court's request for additional jury instructions related to Mellon's claims that Deluxe Data breached an agreement to "team exclusively" (Count II) and that it breached a fiduciary duty allegedly owed to Mellon (Count VII). (*See* Oct. 21, 1997, T.T. pp. 89-94). Mellon argued for the first time in its Supplemental Jury Instructions that the phrase "subject to finalizing a teaming agreement" created a condition subsequent, instead of a condition precedent. Mellon, however, had already admitted (1) that the language created a condition precedent to the formation of any teaming or partnering agreement between Mellon and Deluxe Data, and (2) that "subject to finalizing a teaming agreement" was not ambiguous. For example, David Merritt testified that the clause created a condition precedent: "The condition was finalizing the teaming agreement." (Sept. 24, 1997, T.T. pp.

149-50) (reading excerpts of David Merritt's Jan. 8, 1996, deposition transcript, at pp. 179-180).[19]

3. The repeated instructions regarding "an agreement to submit a bid and, if successful, to implement that bid" usurped the jury's function.

The Court erred in repeatedly instructing the jury that the February 28 letter must be construed as "an agreement to submit a bid, and if successful, to implement that bid," despite the fact that Mellon and its counsel maintained throughout the trial that Mellon's contract claim was limited merely to an agreement to submit a bid. *See* Mellon's Proposed Jury Instruction, No. 31. *See also* Plaintiff's Motion in Opposition to Summary Judgment at p. 42 ("the agreement which Deluxe Data breached was an agreement to team exclusivity and to negotiate diligently and required in good faith to reach a final teaming agreement"). In essence, the Court's "agreement ... to implement" instructions invited the jury to surmise that if Deluxe Data and Mellon agreed to bid exclusively together, it would naturally and necessarily follow that the parties would have (a) reached an agreement on all essential terms of their relationship; (b) completed and submitted the successful bid; (c) successfully negotiated contracts with the federal government and each of the states that comprised the SAS; and (d) thereafter, successfully

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[19] Since Section 7 of the Confidentiality Agreement reinforces the fact that the "subject to" clause of the February 28 letter was a condition precedent, the jury should have been instructed to construe the confidentiality against Mellon, the drafter. *See* p. 9-10 *supra*. The Court also failed to instruct the jury that it should construe against Mellon, the drafter, the ambiguities in Section 7 of the Confidentiality Agreement, Section 7 reinforces the fact that the "subject to" clause of the February 28 letter was a condition precedent. *See supra* at p. Id.

implemented each and every aspect of the SAS Project, without the assistance of any other subcontractors or partners. ***There was absolutely no evidence admitted at trial to support any of these assumptions.*** The evidence that was presented specifically negated any inference that the parties had taken any steps whatsoever toward arriving at an agreement to actually implement the SAS Project.

These instructions were particularly prejudicial because they permitted Mellon to change its case at the eleventh hour. For example, during trial, Mellon submitted the following proposed jury instruction to the Court:

> 31. Breach of Contract - Two Contracts: In this case, Mellon Bank alleges that Deluxe Data breached two separate and independent contracts. ***One contract was an alleged agreement between Mellon Bank and Deluxe Data to team exclusively and negotiate diligently and in good faith to reach a final teaming agreement.*** The other contract was a Confidentiality Agreement allegedly executed on March 14, 1995. Because these two alleged contracts are separate and independent you should evaluate each alleged contract separately as to its formation, terms and whether it was breached by Deluxe Data. Absolutely no mention was made by Mellon of any agreement that it had reached with Deluxe Data regarding implementation, because admittedly such an agreement did not exist.

Mellon's Proposed Jury Instruction, No. 31 (emphasis added). In addition, Mellon requested a similarly worded jury instruction at the close of trial, stating that Mellon's claim was that it and Deluxe Data had "entered into an

agreement to deal exclusively and negotiate in good faith towards the signing of a final teaming agreement." *Id.*, Mellon's Proposed Jury Instruction, No. 35; *see also id.*, Mellon's Proposed Jury Instructions Nos. 37 and 39.

Mellon confirmed this admission of fact when it expressly defined for the Court during the course of trial the extent of the claim that an "exclusivity" agreement existed between Deluxe Data and Mellon:

> [Court]: As we understand it, there are two contract claims, and one of them isn't a problem, the breach of the confidentiality agreement. The law is clear on that, and that's not a problem. But there seems to be another breach of contract claim. I'm not sure exactly what that's based on, and maybe you can tell me that.
>
> [Mellon's Counsel]: It's based on breach of the agreement to work with Mellon exclusively.
>
> [Court]: Okay.
>
> [Mellon's Counsel]: Toward submission of a bid.
>
> [Court]: ***Okay. That's what we thought.***

(October 21, 1997 T.T. at p. 89 lines 9-20) (emphasis added).[20]

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[20] The exchange between the Court and Mellon occurred after Sharon Murtha, Mellon's counsel, specifically testified at trial that the Confidentiality Agreement she drafted was intentionally worded to indicate to Deluxe Data that Mellon had ***not*** agreed to any contract to

Despite this explicit understanding, the Court erroneously charged the jury that the alleged agreement extended far beyond what Mellon had requested or claimed, and incorrectly permitted the jury to speculate, without the benefit of any evidence, on "profits" Mellon might have earned if Mellon and Deluxe Data had actually implemented the SAS Project. This error permeated the instructions to the jury:

> Jury Charge (p. 16): "With regard to Plaintiff's contention that it had agreed with Defendant Deluxe Data Systems to team exclusively to submit a bid for the Southern Alliance of States project, ***and if successful, to implement the project***, you must determine whether the parties manifested an intention to be bound by the essential terms of the alleged Agreement."
>
> Jury Charge (p. 17): "If you find that Plaintiff has proved the existence of either contract, that is, that Plaintiff and Defendant Deluxe Data Systems agreed to team exclusively to submit a bid for the Southern Alliance of States project, ***and, if successful, to implement the project***, and/or a valid confidentiality agreement, then you must go on to consider whether Plaintiff has proven, also by a preponderance of the evidence, its own performance under each of the alleged contracts."

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actually implement the SAS Project, even if a bid was submitted by Mellon and Deluxe Data. Sept. 29, 1997 T.T., p. 135, lines 8-20 and p. 136, line 20 - p. 137, line 17.

Jury Charge (p. 18): "In this case, Plaintiff contends that Defendant Deluxe Data Systems violated the alleged contract to team exclusively to submit a bid for the Southern Alliance of States project, ***and, if successful, to implement the project***, by failing to deal exclusively and negotiate diligently and in good faith with Plaintiff to submit such a bid."

Jury Charge (p. 22): "In this case, Plaintiff alleges that it is entitled to recover under the legal theory of promissory estoppel for Defendant Deluxe Data Systems' alleged failure to team exclusively to submit a bid for the Southern Alliance of States project, ***and, if successful, to implement the project."***

Jury Charge (p. 23): "Should you find that Plaintiff has proven the existence of a contract to team exclusively to submit a bid for the Southern Alliance of States project, ***and, if successful, to implement the project,*** you should find in favor of Defendant Deluxe Data Systems on Plaintiff's promissory estoppel cause of action.

* * *

If you find that Plaintiff has proven the existence of a valid contract to team exclusively to submit a bid for the Southern Alliance of States project, ***and if successful, to implement the project***, regardless of whether or not you find that Defendant Deluxe Data Systems has breached that contract, you should find for the Defendant on

> Plaintiff's promissory estoppel cause of action."
>
> Jury Charge (pp. 24-25): "In order to satisfy the first element of Plaintiff's promissory estoppel claim, the Plaintiff must prove by clear and convincing evidence that Defendant Deluxe Data Systems made a promise to the Plaintiff that they would team exclusively to submit a bid for the Southern Alliance of States project ***and, if successful, to implement the project."***
>
> Jury Charge (p. 33): "Plaintiff also alleges that a confidential relationship existed between it and Defendant Deluxe Data Systems because they entered into a joint venture to team exclusively to submit a bid for the Southern Alliance of States project, ***and, if successful, to implement the project."***
>
> Jury Charge (p. 34): "In addition to establishing that Plaintiff and Defendant Deluxe Data Systems had entered into a contract, either express or implied, to team exclusively to submit a bid for the Southern Alliance of States project, ***and, if successful, to implement the project***, Plaintiff must prove the following elements by a preponderance of the evidence."

At the same time, the Court confused matters by rejecting Deluxe Data's Proposed Instruction No. 97, which would have instructed the jury to return a verdict in favor of Deluxe Data if Mellon was unable to prove any of the following assumptions: (1) that absent Deluxe Data's decision to end negotiations, Mellon could have proceeded

with and submitted a bid for the SAS Project; (2) if Mellon submitted a bid, it would have been awarded the contract; and (3) if Mellon was able to implement and operate the SAS Project, it would have done so profitably. Thus, the jury instructions, as given, improperly removed these important issues of causation from Mellon's burden of proof, and usurped the jury's fact-finding role.

4. The letter of intent instruction was erroneous.

The Court erred in rejecting Deluxe Data's Proposed Instructions No. 20 and 29 and by failing to properly instruct the jury that a "letter of intent" is merely an agreement to negotiate, particularly where the "letter of intent" contains language which expressly conditions the formation of the anticipated final agreement on the occurrence of some event. *SDK Investments, Inc. v. Ott*, 1996 U.S. Dist. LEXIS 1678 (E.D. Pa. February 14, 1996)(a "letter of intent" is no guarantee that the final contract will be concluded, even if the parties fulfill their obligations to negotiate in good faith). *See also A/S Apothokernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc.*, 873 F.2d 155 (7th Cir. 1984); *Teachers Ins. and Annuity Ass'n. v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987); *Burgess Constr. Co. v. M. Morrin & Son Company, Inc.*, 526 F.2d 108, 113 (l0th Cir. 1976) (the words "subject to" usually indicate that a condition has been created and that a promised act is not to be performed except upon the happening of the condition); 17 Am. Jur. 2d Contracts §§ 465, 466, 468 (1991).

5. The breach of fiduciary duty instruction incorrectly stated the law.

The Court erred in rejecting the last sentences of Deluxe Data's Proposed Instructions No. 48 and 52 regarding

Mellon's claim for breach of fiduciary duty. The Court incorrectly permitted the jury to find a joint venture in the absence of evidence to prove that the IEI process allowed a joint venture to participated **[SIC]** as well as many of the required elements of a joint venture, including a binding agreement, the precise contribution each party was going to make to the project in the way of services, skills and money, and exactly how the profits or losses would be shared between the parties. *In re PCH Associates*, 949 F.2d 585 (2d Cir. 1991) (interpreting Pennsylvania law). *See also Wilkins v. Heebner*, 480 A.2d 1141 (Pa. Super. 1984); *SDK Investments, Inc. v. Ott*, 1996 U.S. Dist. LEXIS 1678 (E.D. Pa. Feb. 14, 1996); *Kale v. Dennis*, 132 F. Supp. 263 (E.D. Pa. 1955).

6. The lost profits instruction incorrectly stated the law.

The Court erred in rejecting the last sentence of Deluxe Data's Proposed Instruction No. 98 and in failing to instruct the jury that when a party seeking to recover lost profits does not have an established history in that particular business, that party has the burden of proving that, despite no track record of its own, the amount of profits it would have made can be estimated with reasonable certainty. This is particularly true in Pennsylvania where a higher standard of proof for new businesses and ventures is applied to determine liability and any resulting damages. *Carpenter Technology Corp. v. Armco, Inc.*, 800 F. Supp. 215, 226 (E.D. Pa. 1992); *See* p. 8, *supra*;

7. The jury should have been instructed regarding the economic loss doctrine.

The Court erred in rejecting the last sentence of Deluxe Data's Proposed Instruction No. 100 and in failing to instruct the jury that, as established by Pennsylvania case

law, the economic loss doctrine prevents a party from recovering damages on a tort claim where the party's loss is solely economic. A party's loss is solely economic if the party claims that it has lost profits or incurred costs or expenses, but has not suffered personal injury or property damage. *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269 (M.D. Pa. 1990); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604 (3d Cir. 1995). Accordingly, unless Mellon demonstrated that it had suffered injury to property, the jury could not award damages to Mellon for any of its claims in tort.

C. Errors in the Court's evidentiary rulings require a new trial.

1. Errors regarding "confidential" documents.

The Court erroneously permitted Mellon, over Deluxe Data's objections, to admit stacks of documents into evidence and then claim that the documents contained confidential information, without pointing to an actual paragraph, sentence or word that purportedly was Mellon's confidential information in each of those documents. In those piles of papers were documents admitted into evidence for the limited purpose of establishing that the documents were in Deluxe Data's possession. Many of those documents were ***never*** identified by Mellon as containing its confidential information, despite the Court's prior ruling that Mellon must identify confidential information by July 29, 1996 or such claims would be waived. Mellon thus sandbagged both Deluxe Data and the Court when it claimed at trial, for the first time, that the Citibank bid response was a document that contained Mellon's confidential information. By allowing Mellon to try its case without specifying the confidential information that it had allegedly provided to Deluxe Data, the Court improperly shifted the burden of proof to Deluxe Data

to show that no information exchanged by the parties was confidential.

Likewise, contradicting its prior ruling, the Court erroneously refused to allow Deluxe Data to offer into evidence a letter explaining why Deluxe Data had stamped documents produced in discovery as "confidential" or "attorneys only." (*See* Sept. 24, 1997 T.T. at p. 131 and Sept. 23, 1997 T.T. at pp. 176-181). The Court had ruled at the beginning of trial that Deluxe Data would be permitted to introduce this letter. (*See* Sept. 15, 1997 T.T. at pp. 30-32). In changing that ruling and precluding Deluxe Data's evidence, the Court allowed the jury erroneously to conclude, as Mellon's counsel prejudicially argued in closing, that stamps applied during discovery proved the "confidentiality" of information Mellon had provided Deluxe Data. (Oct. 27, 1997, T.T. p. 156, lines 1-19).

2. Deluxe Data was improperly denied use and access to Mellon's allegedly inadvertently produced documents.

During the discovery phase of this litigation, Mellon allegedly inadvertently produced several documents that it later claimed contained or reflected attorney-client communications and attorney work product. Counsel for Deluxe Data believe that several of those documents mentioned the importance of indemnity to finalizing a teaming agreement, as well as other relevant facts. Ultimately, the Court ruled that the documents be returned to Mellon and that none of the information set forth in the documents could be used at trial. This incorrect decision prejudiced Deluxe Data's ability to demonstrate that Mellon's arguments and positions presented to the Court regarding the existence of the alleged "exclusivity agreement" were contrary to what was known by internally at Mellon and its lawyers.

D. The Court erred in refusing to strike juror number 12 for cause.

A new trial should be granted because the Court refused to strike from the panel a juror whose daughter worked for Mellon. The court rejected Deluxe Data's challenge for cause of juror number 12, Pamela Tarpley, whose daughter, Felicia Tarpley, has been employed at Mellon since March of 1997. Deluxe Data's basis for objection was that the juror might feel pressure to reach a verdict for Mellon or face the possibility of a backlash affecting her daughter's employment situation. (*See* Sept. 16, 1997 T.T. at pp. 9-11). As this Court acknowledged, the fact that Ms. Tarpley's daughter worked in the global cash management department at Mellon was not learned until after she had initially been seated (but before the jury was sworn), and after Deluxe Data had exhausted its preemptory challenges.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD ORDER A REMITTITUR OF THE AWARD.

This case is ideally suited for remittitur, "[t]he procedural process by which an excessive verdict of the jury is reduced." *See Refuse Management Systems, Inc. v. Consolidated Recycling and Transfer Systems, Inc.*, 671 A.2d 1140 (Pa. Super. 1996). Remittitur is appropriate where, as here, "money damages awarded by a jury are grossly excessive as a matter of law." *Id. citing* Black's Law Dictionary, 1295 (6th ed. 1991). In these circumstances, "the judge may order the plaintiff to remit a portion of the award. In the alternative, the court may award a complete new trial or a trial limited to the issue of damages. The court may also condition a denial of a motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount." *Id.*; *see also Haines v. Raven Arms*, 640 A.2d 367 (Pa. 1994)

(remittitur where the award is plainly excessive or exorbitant and "the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption") (*citing Carmionati v. Philadelphia Transp. Co.*, 176 A.2d 440, 445 (Pa. 1962)).

By way of illustration, the court's damages analysis in *Atacs Corp. v. Trans World Communications, Inc.*, 1997 U.S. Dist. LEXIS 7749 (E.D. Pa. 1997) is instructive. In *Atacs*, Judge O'Neil of the Eastern District of Pennsylvania determined that the proper measure of damages for breach of a teaming agreement is "lost opportunity" damages. The Court followed a three-step process for determining whether a plaintiff is entitled to such damages, and if so, the proper measure: (1) the plaintiff must prove that "it was more likely than not" that it would have entered into the contract contemplated by the teaming agreement; (2) if the plaintiff satisfies this burden, the proper measure is: (a) the value of the profits that would have been derived if the contemplated contract had been successfully negotiated, (b) reduced by the likelihood, expressed as a percentage, that the negotiations would have failed. *Atacs*, 1997 U.S. Dist. LEXIS 7749, at *49-51 (*citing Air Technology Corp. v. General Elec. Co.*, 199 N.E.2d 538, 549 (Mass. 1964)).

Strong similarities between the cases commend application of the *Atacs* methodology to this case. There, as here, the parties were contemplating a bid on a government contract. There, as here, the plaintiff thought that it would enter into a teaming agreement with the defendant. There, as here, the defendant believed it had not entered into a binding agreement. There, as here, defendant teamed with another party. There, as here, the defendant and its new partner won the contract. And there, as here, the plaintiff prevailed on its breach of contract claim.

As to the first step in the *Atacs* methodology, determining the profits that would have been derived if the contract contemplated by the teaming agreement had been negotiated, it is evident that the only estimate of lost profits that could be supported by the evidence is the lost profits projected by Citibank.[21] Brian Claire from Citibank testified that as of the second quarter of 1997, Citibank projected total future profits of $6-10 million on the SAS Project. Oct. 7, 1997, T.T. page 106, lines 9-25. Citibank's projection is based on its actual experience in implementing the SAS Project, and in executing the various contracts required under the SAS Project.[22] Taking the high end of Citibank's projected profits over the estimated seven-year term of the SAS project, reduced to present value, Citibank's estimate of $10 million in lost profits results in a measure of lost profits totaling approximately $5,601,192.[23]

The next step in the *Atacs* analysis requires an adjustment to account for the likelihood, expressed as a percentage, that Mellon would have been awarded the SAS

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[21] Deluxe Data assumes, solely for the purposes of this remittitur analysis, that the facts are consistent with the jury's findings.

[22] As a matter of Skramstad's projections (relying on projections made more than two years before contract performance commenced) are invalid and should not have been submitted to the jury. *Advent Sys., Ltd.*, 925 F.2d at 681-82 (rejecting expert testimony on lost profits based on sales projections generated three years before trial and contradicted by more recent projections and actual sales).

[23] This analysis of present value assumes contract performance commencing in 1997, the year performance on the SAS Project actually began; a discount rate of 13.21%; and that the profits are received over the final five years of the Project. The discount rate is the weighted average cost of capital for SIC Code 7374, which is for establishments engaged in providing computer processing and data preparation services derived from Ibbotson Associate's *Cost of Capital Quarterly, 1996 Yearbook*.

contract. In this case, remittitur should cap any award to Mellon at an amount reflecting Mellon's total lack of experience in this business and the extreme speculation that mars the damages calculation. Mellon's own witness, Dominick Cavuoto, speculated that Mellon's chances of being awarded the SAS Project were "as good as" Citibank's. Expressed as a percentage, Cavuoto's statement equates to a likelihood of 50% that as between Mellon and Citibank[24] Mellon would not have been awarded the SAS Project.[25] As such, the present value of Mellon's lost profits must be reduced by 50% to determine Mellon's lost opportunity damages. Accordingly, the highest amount of lost opportunity damages that a jury could have awarded in Mellon's favor is $2,800,596.[26]

Strong public policies compel reduction of the jury's grossly excessive verdict. The entire federal procurement system is predicated on the view that it is in the best interest of the public to promote competition. In the EBT industry, the federal government requires the benefits of such competition to implement its EFT 99 initiative at a cost that

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[24] The record reflects that there were more than two bidders and, therefore, Mellon would have been one of several bank [**SIC**] vying for the prime contractor role.

[25] Of course, it is arguable that even this is an overstatement of Mellon's likelihood of winning the SAS Project since Citibank was not Mellon's only competitor. Rather, there were a number of other bidders. As such, even if Mellon's chances of winning the SAS contract were "as good as" Citibank's, its overall chance of winning the Project was lower than 50% when the probability that other bidders could win the SAS bid is factored in. Moreover, the 50% discount rate also does not factor in the uncertainty associated with obtaining the state contracts for the full seven-year term.

[26] The Court may also reduce Mellon's damages award to its reliance damages alone, which more accurately reflect the likely impact Deluxe Data's alleged actions might have had on Mellon's expectations.

will be beneficial to the citizens of the United States. A verdict of this size, which is inherently speculative in nature, in an industry where competition is already limited by the up-front cost of participation, will only serve to further limit the opportunities for competition by causing potential bidders to be excessively cautious when exploring opportunities to retain others or serve as subcontractors.

V. A STAY OF EXECUTION AND FURTHER PROCEEDINGS IS APPROPRIATE AND NECESSARY TO AVOID PREJUDICE TO DELUXE DATA'S RIGHTS.

For all of the foregoing reasons, Deluxe Data requests a stay of execution and of any other proceedings to enforce the judgment entered against Deluxe Data and in favor of Mellon. Deluxe Data has raised for this Court's consideration significant appellate issues regarding the governing legal standards and the sufficiency of the evidence when the correct legal standards are applied.

It would be prejudicial to Deluxe Data's interests to permit Mellon to execute on the judgment in the face of legal challenges to the bases for the verdict upon which the judgment was entered. Mellon's interests, on the other hand, can be adequately protected pending the Court's studied consideration of Deluxe Data's challenges by requiring Deluxe Data to post a bond for a reasonable amount if such a need should arise. However, Federal Rule of Civil Procedure 62(b) specifically recognizes that a request for stay may be granted without the need for any security being provided by the party against whom the judgment was entered, and Deluxe Data suggests that its reputation and reliability obviate the need for security.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, Deluxe Data respectfully requests that the Court:

A. Enter an order pursuant to Fed. R. Civ. P. 50, setting aside the jury's verdicts and entering judgment as a matter of law in Deluxe Data's favor on each of Mellon's claims.

B. Alternatively, order a new trial on all issues under Fed. R. Civ. P. 59.

C. Alternatively, order on all issues a new trial on damages under Fed. R Civ. P. 59.

D. Alternatively, enter an order and amended judgment: reducing the jury's excessive award of compensatory damages, or conditioning denial of Deluxe Data's motion for a new trial on Mellon's acceptance of a reduction in the jury's excessive verdict and, in the event the Court does not disallow or reduce the award, a new trial on damages.

E. Enter a stay of execution and of any other proceedings to enforce the judgment entered against Deluxe Data and in favor of Mellon.

DATED: November 14, 1997 Respectfully submitted,

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